SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SAINT LAWRENCE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SETH A. SNYDER,

Defendant.

**NOTICE OF MOTION**

Indictment No. 2012-137

Index No. 21112

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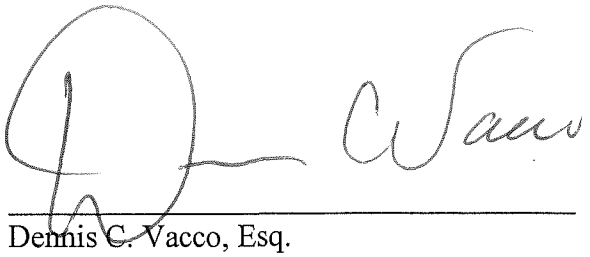
PLEASE TAKE NOTICE that upon the annexed duly verified affirmation of Dennis C. Vacco, Esq., the indictment on file in the Office of the Clerk of this Court under the indictment number 2012-137, and upon all the proceedings and pleadings heretofore had herein, the undersigned will move this Court at the Courthouse of this Court, at 48 Court Street, Canton, New York, on the 25th day of March, 2013, at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard for an Order directing the following:

1) An Order, pursuant to CPLR 2221(e) for leave to renew that portion of the Defendant's July 12, 2012 Omnibus Motion, which sought a dismissal of the indictment in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40; and

2) An Order dismissing all charges in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40 or in the alternative a hearing to determine whether a dismissal pursuant to N.Y. Crim. Proc. Law §210.40 is appropriate.

Such other and further relief as to this Court may appear to be just and proper.

DATED: Buffalo, New York
February 22, 2013



Dennis C. Vacco, Esq.
Richard M. Scherer, Jr., Esq.
Lippes Mathias Wexler Friedman LLP
665 Main St., Suite 300
Buffalo, NY 14203

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SAINT LAWRENCE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SETH A. SNYDER,

Defendant.

**AFFIRMATION OF DENNIS C. VACCO**

Indictment No. 2012-137

Index No. 21112

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STATE OF NEW YORK )
COUNTY OF ERIE ) ss.:

**DENNIS C. VACCO**, an attorney duly admitted to practice law before the courts of this State, hereby affirms the following to be true subject to the penalties of perjury:

1. I am a Partner with LIPPES MATHIAS WEXLER FRIEDMAN LLP, attorneys for the Defendant Seth A. Snyder (the "Defendant"), and as such am fully familiar with the facts and circumstances of this case.

2. This affirmation is submitted on behalf of the Defendant in support of his Motion to Renew that portion of the Defendant's July 12, 2012 Omnibus Motion, which sought a dismissal of the indictment in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40.

## PROCEDURAL HISTORY

3. On May 3, 2012, Defendant was indicted and charged with violating New York Tax Law Section 1814(c)(2).

4. An arraignment of the Defendant upon the Indictment took place before this Court. At the arraignment the Defendant entered a plea of not guilty and as of this

date no plea of guilty has been entered by said Defendant nor has a trial been commenced as to the aforementioned charge.

5. On July 12, 2012, Defendant brought an Omnibus Motion seeking amongst other things a dismissal of all charges in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40. A copy of Defendant's initial moving papers is attached hereto as **Exhibit A**.

6. On August 9, 2012, the People served its opposition papers opposing the Omnibus Motion. A copy of the People's opposition papers are attached hereto as **Exhibit B**.

7. On August 27, 2012, Defendant served his reply papers in further support of his Omnibus Motion. A copy of Defendant's reply papers are attached hereto as **Exhibit C**.

8. On September 11, 2012, the Court heard oral argument on Defendant's Omnibus Motion.

9. On December 11, 2012, the Court denied Defendant's Omnibus Motion as it relates to the dismissal in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40. A Copy of the Order is attached hereto as **Exhibit D**.

10. Only after the Defendant received correspondence from the Court scheduling the trial for January 29, 2013, did your affiant learn new facts that were **not** available at the time the Defendant's Omnibus Motion was first filed, at the time of the oral argument in support of the Omnibus Motion, nor at the time the Court denied the Defendant's motion for a dismissal in the furtherance of justice. If the new facts were known to the Defendant at the time of its Omnibus Motion or the oral argument on this

motion, and presented to the Court these new facts would have changed the Court's prior determination.

## LEGAL STANDARD

11. It is the general rule that "all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial . . . ." N.Y. Crim. Proc. Law §255.20(1). However, N.Y. Crim. Proc. Law §255.20(3) provides an exception to this rule:

> [T]he court must entertain and decide on its merits, at anytime before the end of the trial, any appropriate pre-trial motion ***based upon grounds of which the defendant could not, with due diligence, have been previously aware***, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one.

N.Y. Crim. Proc. Law §255.20(3) (emphasis added); *see also People v. Walker*, 19 Misc. 3d 444, 446 (Monroe Co. Sup. Ct. 2008) (citing *Caffee v. Arnold*, 104 A.D.2d 352 (2d Dep't 1984)).

12. In the context of a motion to renew, a criminal court will follow the same standard as found in C.P.L.R. §2221(e). *See People v. Harrison*, 2009 N.Y. Misc. LEXIS 5980 (Kings Co. Sup. Ct. Apr. 21, 2009) (citing C.P.L.R. §2221(e)).

> A motion to renew should be utilized only to alert the court to facts which were not known by the moving party at the time of the original motion, but which support the grounds raised in the original motion. Renewal is not available where the facts upon which the motion is based were known to the moving party at the time of the original motion.

*Id.* (internal citations omitted).

13. CPLR §2221(e) provides as follows:

> A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

CPLR §2221(e)

14. In the present case, Defendant's Motion to Renew is appropriate because it is entirely based on facts, explained in detail below, that did not exist until the last week of December 2012 and were not known to the Defendant until January 25, 2013 when your affiant had a conversation with an attorney representing a similarly situated individual. All of these dates are well after Defendant made his motion and the Court rendered its decision. Insomuch as it is clear that events which form the foundation for the new facts did not occur until late December of 2012, Defendant has clearly demonstrated that he could not have been aware of them at the time the original Omnibus Motion was made, making it impossible to raise these issues when the original Omnibus Motion was made.

15. Finally, for the reasons set forth in more detail below the new facts at issue here would, and should, change the Court's prior determination denying Defendant's request for a dismissal in the furtherance of justice.

## LEGAL ARGUMENT

## POINT I

### The New Facts: The New York State Attorney General Has Returned Unstamped and Untaxed Native American Cigarettes in a Case Nearly Identical to this Case

16. The new facts at issue here are straightforward and involve incontrovertible evidence of the People's selective prosecution of the Defendant. Below is a detailed recitation of these facts.

*A. The People's decision to not prosecute a nearly identical matter.*

17. On August 10, 2012, a truck transporting eighty four (84) cases of Native brand cigarettes, traveling from the Saint Regis Mohawk Indian ("SRMI") reservation in Akwesasne and Hogansburg, New York, to the Seneca Nation of Indians ("SNI") reservation in Irving, New York, was stopped by the New York State Police ("NYSP") on Route 37 in St. Lawrence County.

18. The cigarettes were, like those in the instant case, not stamped and no taxes were paid to New York State.

19. The truck and the contents being transported therein were owned and operated by Iroquois Wholesale (hereafter, "Iroquois"). Like Seneca Hawk (the Defendant's employer at the time he was stopped by the NYSP), Iroquois is a company operating out of, and licensed as a cigarette wholesaler by the SNI in Irving, New York. Attached hereto as **Exhibit E** is a copy of Seneca Hawk's SNI Business License.[1]

20. Upon information and belief, after the NYSP's seizure of the cigarettes, St. Lawrence County Assistant District Attorney, Jonathan Becker was in charge of investigating this matter. Mr. Becker has handled several similar cases which resulted in

[1] Please note that Seneca Hawk's formal name is Seneca Hawk Tobacco Project Wholesale. As the Court will see in Exhibit I below, this formal name is sometimes shortened to S.H.T.P.W.

prosecutions based upon seizures of unstamped and non-taxed cigarettes. During the oral argument on the Defendant's Omnibus Motion, Mr. Becker acknowledged that his position was partially funded by the Department of Taxation and Finance through the so-called New York State Crimes Against Revenue Program ("CARP"). However, at some point the investigation was assumed by the New York State Attorney General. Upon information and belief, the Assistant Attorney General handling this matter was Aaron Baldwin, Esq.

21. Unlike the present action, neither the St. Lawrence District Attorney nor New York State Attorney General sought to indict those involved with the transportation on August 10, 2012 of 84 cases of unstamped cigarettes.

22. Having had their cigarettes seized but not having been prosecuted, on or about December 4, 2012, Iroquois commenced an Article 78 Petition naming the NYSP, St. Lawrence County District Attorney Nicole M. Duve, St. Lawrence Assistant District Attorney Jonathan Becker, New York State Attorney General Eric T. Schneiderman, and New York State Department of Tax and Finance Commissioner Thomas H. Mattox as Respondents and seeking the return of the seized cigarettes. A copy of the Article 78 Petition and supporting papers are attached hereto as **Exhibit F**.

23. Thereafter, the New York State Attorney General's Office reached out to Iroquois' counsel Tim Murphy, Esq. and informed him that the Respondents, including the St. Lawrence District Attorney and the New York State Attorney General would not be answering the Article 78 Petition and would instead simply return the cigarettes. A letter from Iroquois' counsel confirming this is attached hereto as **Exhibit G**.

24. Thereafter, in the last week of December 2012, the People returned the unstamped cigarettes to Iroquois and on January 11, 2013, Iroquois filed a notice of discontinuance. A copy of the discontinuance is attached hereto as **Exhibit H**.

***B. The similarities between the Iroquois matter and the present prosecution.***

25. As the Court is well aware, the facts presented above are nearly identical to the allegations made against Defendant.

26. As set forth in the Indictment (attached as Exhibit A to Defendant's Omnibus Motion), Defendant was charged with the possession or transportation of unstamped cigarettes in violation of Tax Law §1814(c)(2).

27. Specifically, it is alleged that the Defendant possessed or transported 92 cases of unstamped Native brand cigarettes.

28. This charge arose out of a the Defendant being stopped, like the driver for Iroquois, in Saint Lawrence County, while traveling from the SRMI reservation in Akwesasne to the SNI reservation in Western New York. In fact, in both cases, the Native brand cigarettes originated at the same wholesaler, Speedway Cigarettes. *See* Bill of Lading attached as **Exhibit I** and the Bill of Lading attached to Exhibit D, at Exhibit A.

29. Likewise both loads of cigarettes were in route to the SNI reservation where they would be stamped by the SNI pursuant to applicable SNI law.

30. Specifically, the Native brand cigarettes being transported by Seneca Hawk were first to be shipped to a stamping agent licensed by the SNI, where the cigarettes would be stamped pursuant to the laws of the SNI and then, once the cigarettes were stamped they would arrive at Seneca Hawk to be distributed.

31. As confirmed by St. Lawrence County District Attorney Nicole Duve at a pre-trial conference on January 28, 2013, the Iroquois seizure, like this case was initially referred to Assistant District Attorney Jonathan Becker.

32. This is, however, where the similarities end. At some point after the seizure, the St. Lawrence County District Attorney transferred the Iroquois matter to the New York State Attorney General's Office, who refused to prosecute and ultimately returned the cigarettes to Iroquois. At the same time, the St. Lawrence County District Attorney has continued to prosecute the Defendant and hold 92 cases of seized Native brand cigarettes.

33. There is simply no reasonable explanation for why the Iroquois seizure was not prosecuted while the Defendant was. Instead, this selective prosecution of the Defendant reaffirms the points made in the Defendant's Omnibus Motion that the People and the State of New York lack an understanding as to whether the present situation is illegal. The People's lack of understanding cannot allow them to cherry pick cases to pursue at the expense of the Defendant. For this reason, and the reasons explained below, the Indictment should be immediately dismissed.[2]

## POINT II

## The New Facts Support a Dismissal in the Interest of Justice

34. As the Court is aware, the Defendant's initial Omnibus Motion sought dismissal of all counts in the furtherance of justice, pursuant to N.Y. Crim. Pro. Law

[2] In addition to the Iroquois matter described herein, there is another recent incident in Clinton County which is nearly identical to the present case and which the People of the State of New York has failed to prosecute. Specifically, on December 3, 2012, the NYSP seized 150 cases of Native brand cigarettes traveling from the SNI to the Ganienhkeh territory in Altona, New York. However, like the Iroquois matter, neither the Attorney General nor the District Attorney in Clinton County has brought any charges. As a result, on or about December 7, 2012, Eric White and ERW Wholesale filed a petition in the Seneca Nation of Indians Peacemakers' Court seeking the return of the cigarettes. This action remains pending.

Section 210.40. The Defendant has attached the initial moving papers as Exhibit A and will not reargue these same points. Instead, the present Motion to Renew will concentrate only on the new facts outlined above.

35. In deciding a motion to dismiss in the interest of justice, the Court looks to several factors briefed fully in the Omnibus Motion. The new facts presented here demonstrating the People's selective enforcement of the Defendant bolster several of these factors and render many of the People's arguments in opposition moot.

### *A. The People's Selective Prosecution of the Defendant will Negatively Impact the Public's Confidence in the Criminal Justice System.*

36. One of the factors considered by the Court in determining a motion to dismiss in the interest of justice is "the impact of a dismissal upon the confidence of the public in the criminal justice system." N.Y. Crim. Pro. Law §210.40(1)(g).

37. In this regard it is respectfully submitted that when the new facts presented here, along with the litany of reasons set forth in the original Omnibus Motion, a dismissal is the only way to ensure the public maintains confidence in the criminal justice system.

38. It is well settled that motions to dismiss based on a claim of selective enforcement are firmly rooted in concerns over judicial integrity:

> The theory is that conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the enforcement action. This, even though the party raising the unequal protection claim may well have been guilty of violating the law.

*303 W. 42nd St.*, 46 N.Y.2d at 694; *see also* People v. Acme Markets, Inc., 37 N.Y.2d 326, 330 (1975) ("Discriminatory enforcement as a defense to a criminal action derives from the Federal and State constitutional guarantee of equal protection of the law.").

39. Here it is abundantly clear the People's decision to pursue the Defendant but not the Iroquois matter will taint the public's view of and confidence in the criminal justice system.

40. In opposition to the Omnibus Motion St. Lawrence County Assistant District Attorney stated just the opposite. Specifically, Mr. Becker stated as follows:

- "The defendant argues that the impact of the dismissal will somehow affirm the public's faith in the criminal justice system. This is simply untrue." *See* Exhibit B, at ¶163.

- "Instead, a dismissal would only serve to create a belief by those who obey the law that they do not need to do so. The statue says do not do this thing and the defendant did precisely that." *See* Exhibit B, at ¶165.

41. These statements, however, are now completely turned on their head by the People's decision to return 84 cases of cigarettes to Iroquois under nearly identical circumstances. In light of this the District Attorney must now explain to the People of State of New York why the selective prosecution of some but not others when similar circumstances exist, will affirm the public's faith in the criminal justice system.

42. The Court of Appeals has set forth the following with regard to selective prosecution:

> [A] litigant must show that the law was enforced with both an "unequal hand" and an "evil eye"; "to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification.

*People v. Blount*, 90 N.Y.2d 998, 999 (1997) (quoting *Matter of 303 W. 42nd St. v. Klein,* 46 N.Y.2d 686, 693 (1979)).

43. Said another way, the Court should dismiss this matter in the interest of justice and as a violation of the Defendant's Fourth Amendment rights due to the People's selective prosecution of the Defendant upon a showing that (1) a similarly situated individual was not prosecuted under similar circumstances; and (2) the selective application of the law was due to, amongst other things, some arbitrary classification.

***i. It is plainly clear that the People did not prosecute a similarly situated individual in the Iroquois matter.***

44. "In determining whether persons are similarly situated, '[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. Exact correlation is neither likely nor necessary.'" *Sonne v. Board of Trustees of Vil. of Suffern*, 67 A.D.3d 192, 203 (2d Dep't 2009) (quoting *Penlyn Dev. Corp. v Incorporated Vil. Of Lloyd Harbor*, 51 F Supp 2d 255, 264 (EDNY 1999)).

45. The new facts outlined above clearly establish that the Iroquois matter and the individuals involved there is nearly identical (not just roughly equivalent) to the allegations made against the Defendant here. Accordingly, the Defendant need only show that the decision to not prosecute those involved in the Iroquois matter was due to some arbitrary classification.

***ii. The People's decision to selectively prosecute the Defendant is based on some arbitrary classification.***

46. As set forth in *Blount*, an arbitrary classification is an impermissible standard for prosecution if there is "no rational basis for the prosecutorial choices." *See id.* No such rational basis exists here and it is well settled that political motivation is an

impermissible standard for initiating prosecution. *See People v. Miller*, 138 Misc. 2d 639, 647-48 (N.Y. Cnty. Sup. Crt. 1988).

47. Although the Defendant carries the burden of proving a prosecution is based on an impermissible standard, "the importance of the right to be free from impermissible selective enforcement must be of more than theoretical value, the burden of demonstrating a violation, albeit heavy, must not be so heavy as to preclude any realistic opportunity for success. 'Latitude should be allowed in this complex area of proof.'" *303 West 42nd Street Corp.*, 46 N.Y.2d at 695 (quoting *People v. Walker*, 14 NY2d 901, 902 (1964)). If the People argue that a rationale basis does exist, the Defendant requests an evidentiary hearing to more fully explore the supposed justification.

48. Indeed, the Court of Appeals has recognized that "law enforcement officials are unlikely to avow their intent was to practice constitutionally proscribed discrimination," and that, "***a strong inference of illicit motive will be all that can be expected*** because admission of intentional discrimination is likely to be rare." *Id.* (emphasis added)[3]. Acknowledging the difficulty of this "complex area of proof", the Court of Appeals in *303 West 42nd Street Corp.* held as follows:

> [I]ntent . . . may appear from a convincing showing of a grossly disproportionate incidence of non-enforcement against others similarly situated in all relevant respects save that for which furnishes the basis for the claimed discrimination . . . . The more convincing is the demonstration of the "unequal hand" – ***the grosser the disparity of enforcement and the greater the similarity between those prosecuted and those not prosecuted—the stronger will be the inference of illicit motive***, since

[3] Your affiant's office has recently sought documents, under the Freedom of Information Law, from the NYSP and the New York State Department of Tax and Finance to help support its claims of selective prosecution. These requests, however, remain outstanding.

> conscious discrimination may then stand out as the only reasonable explanation for the pattern of enforcement.

*Id.* (emphasis added).

49. Here, because the Iroquois matter and the present prosecution are nearly identical, there is a strong inference of an illicit motive. Being that only a strong inference can be expected it is respectfully submitted that it is necessary that the Court jointly hold an evidentiary hearing on the issue of selective prosecution and the issue of whether a dismissal in the interest of justice is appropriate.

50. While the strong inference is all that is required of the Defendant, it is respectfully submitted that the conscious decision of the State of New York to selectively prosecute the Defendant is for purely political reasons and not for any justifiable reason. Specifically, it appears that this prosecution, and several others, was brought at a time when the State of New York was more aggressively attempting to collect taxes on Native products. Now, however, for some reason that is lost on your affiant, the State of New York has reversed course and decided to allow other similarly situated individuals to walk away with their unstamped Native cigarettes.

51. In the present case, the Defendant is the grandson of Barry E. Snyder Sr., the current and past President of the SNI. It is not lost on your affiant that the State of New York and the SNI have been engaged in a longstanding dispute concerning not only taxation. As previously argued the taxation of Native American products such as gasoline and cigarettes is a complicated political issue involving much more than just the stamping of Native tobacco products.

52. As stated in the Omnibus Motion the question of taxation of cigarettes sold by Native Americans is further complicated by the ongoing dispute between SNI and

New York over Native American gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"). In 2001 the State Legislature authorized compacts governing IGRA gaming in New York, three of which were granted to SNI. In exchange for a promise by the State of exclusivity in Western New York SNI agreed to pay up to 25% of gaming revenues to the State. Since the establishment of so-called racinos, SNI has withheld hundreds of millions of dollars due to its contention that the State has violated the exclusivity protections of the compact. Lastly, this issue is further complicated by the so-called Master Settlement Agreement ("MSA") entered into by thirty-nine states and the major manufactures of non-native tobacco products, where New York was earmarked to receive $25 billion from these manufacturers.

53. The issues of taxation and gaming have continued to become even more complicated with the anticipated announcement that Governor Cuomo will propose Niagara Falls, New York as the site of a Vegas-style casino, which in the midst of a $500 million revenue payment dispute with the SNI, would directly compete with the SNI's casino in Niagara Falls, New York in direct violation of State compacts governing IGRA.

54. The decision, by the State of New York, to prosecute the Defendant and not other similarly situated individuals, under nearly identical facts, is simply put unjustified, making a dismissal in the interest of justice entirely appropriate.

***B. The People's Selective Prosecution of the Defendant Negates the People's Prior Arguments in Opposition to the Original Omnibus Motion.***

55. In opposition to the Defendant's Omnibus Motion St. Lawrence Assistant District Attorney Jonathan Becker made numerous claims that the conduct of the Defendant was serious and indeed harmful to the State of New York.

56. For example St. Lawrence Assistant District Attorney Jonathan Becker stated the following:

- "By his own admission in his motion, the defendant admits that he was transporting cigarettes for the purpose of sale. (Defendant's Motion at 27)." *See* Exhibit B, at ¶128.

- "The 92 cases of unstamped cigarettes represent approximately $273,792 in unpaid excise and sales taxes. There are approximately 10,000 cigarettes in a case of cigarettes." *See* Exhibit B, at ¶129.

- "The defendant had more 890,000 more cigarettes than he needed to commit the felony. This was not a minor or technical violation of the law. This was egregious." *See* Exhibit B, at ¶130

- "The seriousness of the crime is also based on the theft of much needed revenue to the State. It is well documented that the State, indeed the Country, is mired in a prolonged financial recession." *See* Exhibit B, at ¶132.

- "There are too many victims in this case. The defendant's claim that there are no victims defies common sense." *See* Exhibit B, at ¶143.

57. These statements are turned upside down by the People's recent actions in the Iroquois matter described above. In the Iroquois Article 78 Petition, the petitioners freely admit that they were transporting 84 cases of Native brand cigarettes that were not stamped. Using St. Lawrence Assistant District Attorney Jonathan Becker's own argument this conduct must be egregious because the load contained 810,000 "more cigarettes than he needed to commit the felony", representing approximately $249,984 "in unpaid excise and sales taxes". According to Mr. Becker, this amounts to "the theft of much needed revenue to the State."

58. Despite this logic, the State, and more specifically the Attorney General, decided that the Iroquois matter should not be prosecuted, the State need not pursue the

$249,984 "in unpaid excise and sales taxes", and that the 84 cases of cigarettes should be returned.

59. In opposition to the Omnibus Motion, the People claimed that "[t]here is no controversy that there is an overwhelming evidence of guilt. As the defendant notes in his motion, he freely admits that he was in possession of the cigarettes for the purpose of sale." *See* Exhibit B, at ¶145.

60. As stated above, petitioners in Iroquois matter freely admitted to possessing 84 cases of unstamped and untaxed cigarettes. Despite this "overwhelming evidence of guilt", the Attorney General did not prosecute the petitioners and instead returned the cigarettes without ever even answering the underlying Article 78 Petition.

61. The People additionally argued in opposing the Omnibus Motion that because "[t]he Department of Tax and Finance has already made it explicitly clear it wants [New York Tax Law §1814(c)(2)] enforced" the victim is clearly opposed to dismissal. *See* Exhibit B, at ¶171.

62. However, if the State of New York is the victim and the Department of Tax and Finance wants individuals similarly situated to the Defendant prosecuted, then why would the Attorney General fail to prosecute anyone involved with the Iroquois matter?

63. It is respectfully submitted that the People cannot answer this question. In fact, at a recent meeting with District Attorney Nicole Duve, the Court asked a nearly identical question and Ms. Duve was unable to provide a response.

64. For these reasons, the Indictment should, in light of the new facts presented here, be dismissed.

### C. *The New Facts Raised Here, Along with the Facts Previously Set Forth in the Omnibus Motion Support a Dismissal in the Interest of Justice, or in the Alternative a Hearing.*

65. The Attorney General's decision to not prosecute the Iroquois matter and the Eric White matter in Clinton County affirms and supports the Defendant's prior argument that the State of New York is unable to determine how or if Native brand cigarettes should be subject to tax.

66. As previously made clear, New York's own legislators are confused to the enforcement. Specifically, on May 16, 2011, New York State Senators George Maziarz and Tim Kennedy sent a letter to Thomas Mattox, the Commissioner of the New York State Department of Tax and Finance stating in pertinent part, as follows:

> We write in today in reference to the regulations that have been issued for the collection of New York State Sales Tax on Native territories for sales of tobacco products made to individuals who are not Native Americans. **In reading these regulations, it is clear that the issue of the sale of Native Brand cigarettes and tobacco products, which are produced on Native territories, are not addressed.**
>
> A call to your office yielded the response that this is a "gray area". We respectfully disagree. **There is currently no process in place to stamp Native cigarettes in order to effectuate sales tax collection**, as can and is done with so called premium brands. **It is our view that Native Brand cigarettes,** which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore **cannot be regulated or taxed by the State of New York.** . . .
>
> It is our view that the **State should not pursue an effort to collect taxes on Native Brands** because such an effort would be contrary to the **sovereign rights of the Native Nations** . . . .

*See* Exhibit A, at Exhibit C (emphasis added).

67. This confusion is further supported by the fact that on July 6, 2012 Richard Ernst, acting in his capacity as Deputy Commissioner of Tax Enforcement, issued an "official statement" to various members of the Criminal Investigation Division of the New York State Department of Tax and Finance outlining scenarios involving the movement of unstamped cigarettes in New York State, which sets forth when the cigarettes should be seized and the individuals charged. Directly on point to the present case is the following scenario: "Native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS – **Don't seize**." *See* Exhibit A, at Exhibit B (emphasis in original).

68. When taking these facts and the new facts set forth above into account, it is clear that the District Attorney's decision to prosecute this action is entirely misplaced.

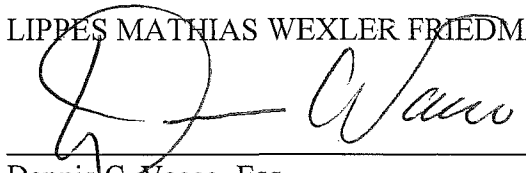
69. It is respectfully submitted that the District Attorney in arbitrarily deciding to prosecute the Defendant, while the Attorney General and neighboring District Attorneys choose not to, is using the Defendant and this Court as a pawn in a rogue prosecution to advance an interpretation of complicated legal issues not shared by the State Department of Taxation, the Attorney General or a neighboring county District Attorneys.

70. For all the above given reasons, it is in the interest of justice that this court grant a dismissal of the indictment in its entirety.

WHEREFORE, your deponent respectfully requests that this motion be granted in all respects, together with such other and further relief as this Court deems just and proper.

DATED: Buffalo, New York
February 22, 2013

LIPPES MATHIAS WEXLER FRIEDMAN LLP



Dennis C. Vacco, Esq.
Attorneys for Defendant, Seth Snyder
665 Main Street, Suite 300
Buffalo, New York 14203
(716) 853-5100

# Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SAINT LAWRENCE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SETH A. SNYDER,

Defendant.

**NOTICE OF MOTION**

Indictment No. 2012-137

Index No. 21112

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PLEASE TAKE NOTICE that upon the annexed duly verified affirmation of Dennis C. Vacco, Esq., the indictment on file in the Office of the Clerk of this Court under the indictment number 2012-137, a copy of which is annexed hereto, and upon all the proceedings and pleadings heretofore had herein, the undersigned will move this Court at the Courthouse of this Court, at 48 Court Street, Canton, New York, on the 23rd day of July, 2012, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order directing the following:

1) That the People produce the requested discovery materials pursuant to Brady and CPL §240.20;

2) That the People notify defense counsel of all specific instances of prior uncharged criminal, vicious, or immoral conduct of Defendant pursuant to CPL §240.43;

3) That a Sandoval Hearing be conducted;

4) That the People provide a response to Defendant's demand for a Bill of Particulars;

5) That the People provide for examination by the Court and the Defendant the minutes of the grand jury proceeding which resulted in the indictment against the defendant, and directing a dismissal of the indictment pursuant to N.Y. Crim. Proc. Law §210.20(1)(b), on the ground that the evidence before the Grand Jury was not legally sufficient to establish the offense charged or any lesser included offense;

6) An order dismissing all charges pursuant to N.Y. Crim. Proc. Law §210.20(1)(b) and (c);

7) That the Defendant be given an opportunity to hold a hearing to suppress physical evidence seized in relation to the Indictment;

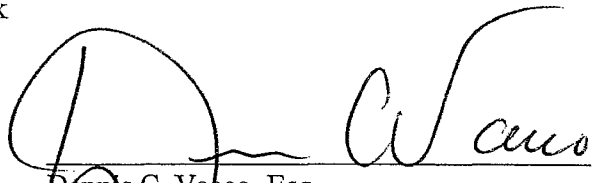
8) An order dismissing all charges pursuant to N.Y. Penal Law § 15.20(2);

9) An order dismissing all charges based on the fact that the presumption relied on by the People (N.Y. Tax Law § 1814(d)) is unconstitutional; and for

10) An order dismissing all charges in the furtherance of justice pursuant to N.Y. Crim. Proc. Law §210.40.

Such other and further relief as to this Court may appear to be just and proper.

DATED: Buffalo, New York
July 12, 2012



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SAINT LAWRENCE

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SETH A. SNYDER,

Defendant.

**AFFIRMATION OF DENNIS C. VACCO**

Indictment No. 2012-137

Index No. 21112

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STATE OF NEW YORK )
COUNTY OF ERIE ) ss.:

**DENNIS C. VACCO**, an attorney duly admitted to practice law before the courts of this State, hereby affirms the following to be true subject to the penalties of perjury:

1. I am a Partner with LIPPES MATHIAS WEXLER FRIEDMAN LLP, attorneys for the Defendant Seth A. Snyder (the "Defendant"), and as such am fully familiar with the facts and circumstances of this case.

2. This affirmation is submitted on behalf of the Defendant in support of an order granting the various relief specified in the Notice of Motion submitted herewith.

3. The Indictment herein charges the Defendant with the violating New York Tax Law Section 1814(c)(2). A copy of said Indictment is annexed hereto as **Exhibit A** and is made a part hereof.

4. An arraignment of the Defendant upon the Indictment took place before this Court. At the arraignment the Defendant entered a plea of not guilty and as of this date no plea of guilty has been entered by said Defendant nor has a trial been commenced as to the aforementioned charge.

5. For the following reasons, the Defendant's requested relief should be granted. Each is specified below and designated by heading.

**POINT I**
**DISCOVERY MATERIAL**

6. It is requested that the People be ordered to produce and deliver to the Defendant all evidence favorable to him bearing upon the issues raised by the Indictment herein which the People may have either in their control, possession or custody pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

7. *Brady v. Maryland* makes it clear that the People are required to produce any and all evidence possessed by them which may be favorable to the Defendant or which may be exculpatory in nature. *Id.* This obligation is a continuing obligation throughout the investigation and prosecution of this matter. *See Kyles v. Whitley*, 115 S.C. 155 (1995).

8. The People indicated at the Defendant's arraignment that it had provided Defendant's counsel with all evidence in its possession. It has come to your deponent's attention, however, that certain *Brady* material has not been made available to or disclosed to the Defendant. Specifically, the Defendant demands documents related to the New York State Department of Tax and Finance's policies and procedures for the taxation of Native American cigarettes. The information which the Defendant demands includes but is not limited to any documents, correspondence, emails or notes generated by any employee of the New York State Department of Tax and Finance, including but not limited to Richard Ernst and Peter Persampieri, which refer to or relate to the collection of taxes on Native American cigarettes and the enforcement of New York law when Native Americans are involved. In addition the Defendant's *Brady* demand

includes any documents, correspondence, emails, notes or other records related to any policies of the New York State Department of Tax and Finance regarding the seizure of unstamped cigarettes which are manufactured by or distributed by Native Americans.

9. Pursuant to NY CPL §240.20, the Defendant also requests that the Court direct production of the following:

a. Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial;

b. Any photograph or drawing relating to the criminal action or proceeding which was made or completed by a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial;

c. Any photograph, photocopy or other reproduction made by or at the direction of a federal agent, police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of section 450.10 of the penal law, irrespective of whether the People intend to introduce at trial the property or the photograph, photocopy or other reproduction;

d. Any other property obtained from the Defendant;

e. Any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction;

f. The approximate date, time and place of the offense charged and of the Defendant's arrest;

g. Anything required to be disclosed, prior to trial, to the Defendant by the Prosecutor, pursuant to the constitution of this state or of the United States, including:

i. An itemized list of all property obtained from the Defendant;

ii. All documents and/or information relating to the New York State Department of Tax and Finance's opinion regarding the seizure of unstamped cigarettes which are manufactured by or distributed by Native Americans;

iii. All documents, correspondence, emails or notes generated by any employee of the New York State Department of Tax and Finance, including but not limited to Richard Ernst and Peter Persampieri, which refer to or relate to the collection of taxes on Native American cigarettes and the enforcement of New York law when Native Americans are involved; and

iv. All documents, correspondence, emails or notes generated by any New York State Legislator or Senator, including but not limited New York State Senators George Maziarz and Tim Kennedy, which were

sent to or provided to the New York State Department of Tax and Finance which refer to or relate to the collection of taxes on Native American cigarettes and the enforcement of New York law when Native Americans are involved.

## POINT II
## PRIOR UNCHARGED CRIMINAL, VICIOUS, OR IMMORAL CONDUCT

10. That your Deponent requests pursuant to Criminal Procedure Law Section 240.43 that the prosecution notify the defense of any and all specific instances of the Defendant's prior uncharged criminal, vicious, or immoral conduct of which the prosecution had knowledge and which the prosecutor intends to use at trial.

## POINT III
## REQUEST FOR SANDOVAL HEARING

11. Your Deponent respectfully asks the Court's permission to reserve his right to conduct a *Sandoval* Hearing prior to commencement of trial to determine the admissibility of any convictions or uncharged criminal, vicious, or immoral conduct of which the prosecution intends to proffer against the Defendant.

12. That in protection of my client's Constitutional Rights, I am respectfully asking for a *Sandoval* Hearing prior to trial.

## POINT IV
## BILL OF PARTICULARS

13. The Defendant requests, pursuant to Section 200.95 of the Criminal Procedure Law, that the People serve and file in writing a verified Bill of Particulars relating to the indictment herein and particularly setting forth the following:

**A. AS TO THE FIRST COUNT OF THE INDICTMENT:**

A. The exact date, time, place and location of the alleged crime.

B. Describe whether the alleged role of the Defendant was that of the principal and/or accomplice and whether there are any unindicted principals or accomplices and the identity of any such person.

C. Describe the precise conduct of the Defendant which the People will offer as evidence of his willful state of mind.

D. Describe the substance of the Defendant's conduct, which indicated that that the Defendant possessed or transported the cigarettes for the purpose of sale.

E. Describe the substance of the Defendant's conduct, which indicated that the Defendant possessed or transported cigarettes "subject to tax".

F. The exact date, time and location of when the alleged crime was reported and to whom it was reported and who made said report.

G. The exact date, time and location of the U.S. Border Patrol checkpoint.

H. Describe any role the U.S. Border Patrol played in any stop of the Defendant and any subsequent seizure.

I. The names of all federal agents involved in the U.S. Border Patrol checkpoint. In particular, identify the federal agents who had direct contact with the Defendant and the vehicle that was seized.

J. Describe any role the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives played in any stop of the Defendant and any subsequent seizure.

K. The names of all federal agents involved in the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives involved in this matter. In particular, identify the federal agents who had direct contact with the Defendant and the vehicle that was seized.

L. Describe any role the New York State Police played in any stop of the Defendant and any subsequent seizure.

M. The names of all officers of the New York State Police involved in this matter. In particular, identify the Troopers who had direct contact with the Defendant and the vehicle that was seized.

**B. AS TO THE SECOND COUNT OF THE INDICTMENT:**

N. The exact date, time, place and location of the alleged crime.

O. Describe whether the alleged role of the Defendant was that of the principal and/or accomplice and whether there are any unindicted principals or accomplices and the identity of any such person.

P. Describe the precise conduct of the Defendant which the People will offer as evidence of his willful state of mind.

Q. Describe the substance of the Defendant's conduct, which indicated that that the Defendant possessed or transported the cigarettes for the purpose of sale.

R. Describe the substance of the Defendant's conduct, which indicated that the Defendant possessed or transported cigarettes "subject to tax".

S. The exact date, time and location of when the alleged crime was reported and to whom it was reported and who made said report.

T. The exact date, time and location of the U.S. Border Patrol checkpoint.

U. Describe any role the U.S. Border Patrol played in any stop of the Defendant and any subsequent seizure.

V. The names of all federal agents involved in the U.S. Border Patrol checkpoint. In particular, identify the federal agents who had direct contact with the Defendant and the vehicle that was seized.

W. Describe any role the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives played in any stop of the Defendant and any subsequent seizure.

X. The names of all federal agents involved in the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives involved in this matter. In particular, identify the federal agents who had direct contact with the Defendant and the vehicle that was seized.

Y. Describe any role the New York State Police played in any stop of the Defendant and any subsequent seizure.

Z. The names of all officers of the New York State Police involved in this matter. In particular, identify the Troopers who had direct contact with the Defendant and the vehicle that was seized.

**POINT V**
**INSPECTION OF GRAND JURY MINUTES/DISMISSAL OF THE INDICTMENT ON INSUFFICIENT GRAND JURY MINUTES/REDUCTION OF INDICTMENT ON INSUFFICIENT GRAND JURY MINUTES**

14. Upon information and belief and upon your deponent's own investigation of the circumstances and facts surrounding the Indictment, to the extent that the investigation has been possible, there is insufficient evidence as a matter of law before the Grand Jury to sustain the Indictment against the Defendant herein; and therefore, the Defendant seeks an inspection of the Grand Jury minutes for viable insufficiencies and further move for dismissal of the Indictment by reason of the failure of proof before the said Grand Jury.

15. Inspection of the Grand Jury minutes in the instant case would in no way prejudice the People of the State of New York nor any way serve to defeat the ends of justice but to the contrary, will operate to provide substantial justice in that the Defendant and Defendant's counsel verily believe that the matters of evidence presented to the Grand Jury were totally insufficient, illegal and incompetent as a matter of law and that said Indictment was not grounded on legal basis and must be dismissed.

16. Upon information and belief, the relevant admissible evidence which was not presented but should have been presented to the Grand Jury is as follows:

a. The July 6, 2011 email sent by Richard Ernst of the Department of Taxation and Finance to individuals in the Criminal Investigation Division of the New York State Department of Tax and Finance entitled "Cigarette Enforcement", which outlined "possible scenario's [sic] involving the movement of untaxed cigarettes in NYS (either premium alone, premium and native American or just native American) and when we could seize and/or charge." A copy of this email is attached hereto as **Exhibit B.** This email instructed investigators in the Criminal Investigation Division of the Department of Taxation and Finance to **not** seize shipments when Native Americans transport untaxed and unstamped Native-manufactured cigarettes between reservations in New York State or to reservations outside of the state. Specifically, this email set forth as follows: "Native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS – **Don't seize.**" *Id.* (emphasis in original). When questioned about the cigarettes in the Defendant's possession, the Defendant produced a copy, or a portion of this email, and provided it to the New York State Police, who did

not comply with the directive from the Department of Taxation and Finance and seized the cigarettes bound for the Seneca Indian Reservation.

b. The cigarettes seized by the New York State Police were sold to the Defendant's employer, Seneca Hawk, by Speedway Cigarettes. Seneca Hawk is wholly owned by members of the Seneca Nation of Indians, while Speedway Cigarettes is believed to be wholly owned by members of the St. Regis Mohawk Tribe. In this regard, the cigarettes were purchased on the Mohawk Indian Reservation and were intended to be transported through New York State to Seneca Hawk's warehouse on the Tonawanda Indian Reservation. Accordingly, the transaction at issue in the present case, relates to a wholly Native to Native transaction.

c. The May 16, 2011 letter sent by New York State Senators George Maziarz and Tim Kennedy to Thomas Mattox, the Commissioner of the New York State Department of Tax and Finance. A copy of this letter is attached hereto as **Exhibit C**. Specifically, this letter sought clarification as to the New York State Department of Tax and Finance's position on Native brand cigarettes and provided the Senators' interpretation of the current stamping regulations. The letter states, in pertinent part, as follows:

> We write in today in reference to the regulations that have been issued for the collection of New York State Sales Tax on Native territories for sales of tobacco products made to individuals who are not Native Americans. **In reading these regulations, it is clear that the issue of the sale of Native Brand cigarettes and tobacco products, which are produced on Native territories, are not addressed.**
>
> A call to your office yielded the response that this is a "gray area". We respectfully disagree. **There is currently no process in place to stamp Native cigarettes in order**

> **to effectuate sales tax collection**, as can and is done with so called premium brands. **It is our view that Native Brand cigarettes,** which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore **cannot be regulated or taxed by the State of New York.** . . .
>
> It is our view that the **State should not pursue an effort to collect taxes on Native Brands** because such an effort would be contrary to the **sovereign rights of the Native Nations** . . . .

Exhibit C (emphasis added). It is clear from the above, that even New York State Senators understood that Native Brand cigarettes are not and cannot be regulated by the State of New York or the Department of Tax and Finance.

d. That pursuant to N.Y. Tax Law § 471, cigarettes sold to "qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation" are not taxable.

17. The above evidence is all possibly exculpatory evidence. In this regard, it is well settled that a prosecutor is **required** to divulge possibly exculpatory evidence to a Grand Jury if the evidence could materially influence the Grand Jury's investigation or change its findings. *People v. Monroe*, 480 N.Y.S.2d 259, 266 (N.Y. Sup. Ct. 1984); *People v. Filis*, 386 N.Y.S.2d 988, 990 (N.Y. Sup. Ct. 1976). Although evidence merely mitigating an offense may be presented at the discretion of the prosecutor, evidence that **might provide for complete exculpation** and avoid a needless or unfounded prosecution must be presented to the Grand Jury. *People v. Lancaster*, 69 N.Y.2d 20, 28 (1986).

18. In the present case, the Prosecutor failed to provide evidence to the Grand Jury that **might** exculpate the Defendant, therefore the charge against the Defendant should be dismissed pursuant to Criminal Procedure Law Section 210.20(1)(b).

Specifically, as discussed above, the "official Statement" by the State Department of Taxation and Finance, the Native to Native nature of the cigarette transaction, the May 16, 2011 letter sent by New York State Senators George Maziarz and Tim Kennedy to Thomas Mattox, and an explanation of New York State's lack of authority to tax Native to Native sales, are all examples of **material evidence** which could fully rebut the presumption of taxation or the culpable state of mind required for conviction under New York Tax Law Section 1814(c)(2).

19. In purposely failing to provide the Grand Jury with the foregoing evidence, the Prosecutor has prolonged a "needless and unfounded" prosecution. *See People v. Valles*, 62 N.Y.2d 36, 38 (1984) ("whether a particular defense need be charged [to the Grand Jury] depends upon its potential for eliminating a needless or unfounded prosecution."). Accordingly, the Indictment should be dismissed as a matter of law pursuant to Criminal Procedure Law Section 210.20.

## POINT VI
## DISCLOSURE OF THE GRAND JURY MINUTES FOR FULL PRESENTATION OF DISMISSAL MOTION

20. The Defendant requests that the Grand Jury testimony be disclosed to the defense, pursuant to Criminal Procedure Law Section 210.30(3), so that counsel might effectively represent the accused on this motion to dismiss.

21. The Defendant requests disclosure of the legal instructions to the Grand Jury so that accuracy and sufficiency of the Prosecutor's instructions to the Grand Jury might be evaluated.

22. Disclosure of Grand Jury minutes is a matter completely within the discretion of the Court, guided, we suggest, by fairness. Most States which, like New

York, allow challenges to the sufficiency of the evidence or instructions to the Grand Jury also allow release of the transcript of the proceedings to the accused. LaFave & Israel, Criminal Procedure, § 15.4(c) (West 1985). Those States regard release as "essential to give meaning to the defendant's right to challenge the indictment" and reject mere in camera review because the Court needs "the assistance of counsel for both sides if it to judge wisely," *See Burkholder v. State*, 491 P.2d 754 (Alaska 1971). The Courts are extraordinarily burdened with the administration of justice.

23. Judges have responsibility for a multitude of tasks which realistically limit the time available to review all matters, both procedural and substantive, that they must address. Allowing the defense access to Grand Jury minutes can only minimize the possibility that an issue, error, or misconduct will escape the Court's attention. The defense is often in a better position to dispute discrepancies with the facts presented to the Grand Jury by the prosecution. Often, only the defense will be in a position to detect misleading testimony.

24. In furtherance of one of the tantamount goals of disclosing Grand Jury materials, disclosure of Grand Jury minutes to the defense can and should be made for the purpose of "assist[ing] the Court in making its determination on the motion, [and the Court] may release the minutes or such portions thereof to the parties." N.Y. Crim. Pro. Law § 210.30(30). In a roughly analogous context, the United States Supreme Court has recognized that it is more appropriate for defense counsel to scour Grand Jury minutes for material of value than trial Judges. *Dennis v. United States*, 384 U.S. 855 (1966). In *Dennis*, the Court said:

> Trial Judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous Grand

> Jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial Judge under the pressures of conducting a trial to pick out all of the Grand Jury testimony that would be useful in impeaching a witness'... Nor is it realistic to assume that the trial Court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for Judges to judge.

*Id.* at 874-75. This is consistent with the concept that a defendant's counsel is in a better position to identify prejudice, inadequacy and error before the Grand Jury than the Judge.

25. It is the case that the spontaneous dismissal of indictments by Judges upon an in camera review of the Grand Jury minutes and/or instructions are exceedingly rare. In most cases which result in either dismissal of indictments or reversal of convictions on account of the insufficiency of Grand Jury evidence or instructions, the minutes were disclosed to counsel of the accused. *See, e.g., People v. Lobban*, Indictment No. 83-1075, (Erie Co. Sup. Ct.); *People v. Baisley*, Indictment No. 86-0453-A, (Erie Co. Sup. Ct. 1987).

26. Numerous cases in New York support the practice of disclosing Grand Jury minutes to defendants for the purpose of preventing various abuses of the Grand Jury system. In fact, the Court of Appeals has recently held that portions of Grand Jury testimony could be reviewed by a court to aid another criminal court in its determination of whether such materials should be disclosed to the defendant as required by *People v. Rosario*, 9 N.Y.2d 286 (1961) *cert. denied* 368 U.S. 866. *See Matter of Stephen F. Lungren v. Kane*, 88 N.Y.2d 861 (1996).

27. In *Lungren*, the Court affirmed the decision of a Sullivan County trial court to disclose portions of Grand Jury testimony to an Orange County trial court where the same defendant had been charged with numerous criminal offenses. The Court stated that in making such a decision, trial courts must first "evaluate whether the party seeking release has shown a compelling and particularized need for the Grand Jury testimony...[and] weigh factors to assess the competing public policies of release versus secrecy blanketing Grand Jury proceedings." Thus, in *Lungren*, the Court of Appeals clearly affirmed the principle that the trial Court has both the authority and discretion to allow the release of Grand Jury minutes to the defendant upon proper consideration of the relevant factors.

28. Lower courts in this State have also acknowledged and adhered to the principle that Criminal Procedure Law Section 210.30 grants trial courts the authority and discretion to order release of Grand Jury minutes to the defendant. In 1982, the Appellate Division, Second Department affirmed this point, but disagreed with the manner in which the release was ordered. That is, the Court found that "the County Court acted in excess of its authority when it released Grand Jury minutes to each defendant without segregating the minutes pertaining to the other defendant's indictments." Therefore, although the Appellate Court ultimately reversed the trial court based upon the error in the manner of release, it affirmed the authority and discretion of the trial court to order release. *Kuriansky v. Rohl*, 86 A.D.2d 638 (2d Dept. 1982); *see also People v. Alamo*, 89 Misc. 2d 246 (Bronx Co. Sup. Ct. 1977) (Bronx County Supreme Court ordered certain portions of the Grand Jury minutes released based upon its determination that "discovery material existed in the form of inconsistent testimony of [the] complainant and . . . no

issue of security was involved."); *People v. Manfro*, New York Law Journal, March 26, 1991, p. 26 (col 4), Volume 205, Number 57 (Queens County Court released the Grand Jury minutes to the defendant, stating that such release was necessary to assist the Court in determining the motion," and that the People had not demonstrated that release would be contrary to the public interest.); *People v. Allies Boulevard Book Store*, 130 Misc. 2d 556, 497 N.Y.S.2d 264 (Broome Co. 1985) (Obscenity prosecution); *People v. Dearstyne*, 215 A.D.2d 864, 626 N.Y.S.2d 879 (3rd Dept. 1995) (Several sex-related offenses perpetrated upon three very young children); *People v. Rosedale Carting Corp.* 1986-2 Trade Cases p. 67, 310, 1986 WL 55320 (Sup. Ct. Kings Co. 1986) (Court observes that it has "on numerous occasions, ordered releases of the Grand Jury minutes").

29. In the case at bar, there are numerous Grand Jury issues that give rise for grounds to dismiss the indictment which need proper investigation and review in order to draft and submit Defendant's Motion to Dismiss the indictment. The manner in which the Grand Jury was instructed; whether the Grand Jury was properly instructed as to the shifting burden created by the presumption New York Tax Law § 1814(d); whether the Grand Jury was properly informed as to what types of cigarettes are "subject to tax" under New York Tax Law; whether the Grady Jury was properly instructed as to the meaning and effect of the fact that New York Tax Law § 1814(c)(2) requires all elements of the crime to be "willingly" committed; whether the Grand Jurors who voted heard the entire testimony of the Grand Jury presentment; the issue concerning hearsay statements, etc. are only a few of the complex issues which need to be thoroughly explored and

addressed. Release of the Grand Jury minutes will allow defense counsel to prepare and submit a "full presentation."

## POINT VII
## SUPPRESSION OF PHYSICAL EVIDENCE HEARING

30. The Defendant hereby makes an application requesting a hearing concerning the suppression of any and all physical evidence seized in relation to this indictment.

31. Upon information and belief, the stop of the Defendant is one of a series of stops in Saint Lawrence, Franklin, and Clinton counties made at U.S. Border Patrol checkpoints.

32. Upon information and belief, the use of U.S. Border Patrol checkpoints is simply a subterfuge so that the New York State Police can gain access to and search box trucks, which may be transporting Native cigarettes from the Mohawk Indian Reservation.

33. It appears from media reports that these U.S. Border Patrol checkpoints have been strategically planned to allow the New York Police to stop (and ultimately seize) box trucks that it would normally be unable to stop.

34. In fact, an attorney from your deponent's office witnessed one of these checkpoints when traveling to the arraignment of the Defendant. At said stop, the U.S. Border Patrol was working closely with the New York State Police to search and stop vehicles.

35. In light of these circumstances, the Defendant requests a hearing to determine the legality (or illegality) of the stop that ultimately led to the seizure of the cigarettes.

## POINT VIII
## DISMISSAL BASED ON PENAL LAW § 15.20(2) ("MISTAKEN BELIEF")

36. Assuming that the Defendant's conduct was illegal, dismissal of all charges against the Defendant is appropriate due to the Defendant's mistaken belief, based on an official interpretation of New York State Tax Law by the New York State Department of Tax and Finance, that the alleged conduct was legal.

37. Pursuant to New York Penal Law Section 15.20(2), a person is relieved of criminal liability where a mistaken belief that the conduct engaged in is not criminal is:

> founded upon an **official statement** of law contained in . . . an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute of law.

N.Y. Penal Law 15.20(2)(d) (emphasis added).

38. The "availability of this defense is based on the theory that where the government has affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct, the individual should not be punished as a result. This is salutary and enlightened and should be firmly supported in appropriate cases." *People v. Marrero*, 69 N.Y.2d 382, 390 (1987); *see also People v. Studifin*, 132 Misc. 2d 326, 331 (Kings Co. Sup. Ct. 1986) ("The action of any official who is appointed to represent the State in its dealings with the public in some particular matter should bind the State affording a defense to a criminal prosecution when the defendant proves that he acted in reasonable reliance on the official's advice to his detriment.")

39. Here, the Defendant has been charged with two counts of violating New York State Tax Law Section 1814(c)(2) for allegedly possessing and transporting unstamped cigarettes "subject to tax".

40. The New York State Department of Tax and Finance is the body legally charged with interpreting and enforcing this statute. *See* N.Y. Tax § 171.

41. Accordingly, where the New York State Department of Tax and Finance issues an interpretation or "official statement" regarding the legality of possessing and/or transporting unstamped cigarettes, the statement can be and should be relied on by New York State taxpayers.

42. As set forth above, on July 6, 2012, Richard Ernst, acting in his capacity as Deputy Commissioner of Tax Enforcement, issued an "official statement" to various members of the Criminal Investigation Division of the New York State Department of Tax and Finance outlining scenarios involving the movement of unstamped cigarettes in New York State, which sets forth when the cigarettes should be seized and the individuals charged.

43. Directly on point to the present case is the following scenario: "Native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS – **Don't seize.**" Exhibit B (emphasis in original). Said another way, the New York State Department of Tax and Finance took the official position, based on an interpretation of New York State Tax Law Section 1842, that it was not illegal to transport or possess unstamped native made cigarettes that are being transported by a Native American from one reservation to another (here the Mohawk Indian Reservation to the Tonawanda Indian Reservation).

44. In the present case, the Defendant relied on the "official statement" of Richard Ernst, the Deputy Commissioner of Tax Enforcement, which affirmatively set forth that Tax Law Section 1814(c)(2) was not to be enforced in situations like here.

45. Here it cannot be disputed that the Defendant was relying on the "official statement" of the New York State Department of Tax and Finance. When the first New York State Trooper arrived at the location of the seizure, the Defendant presented the Trooper with a copy of a part of the "official statement" indicating that his actions were **not** illegal. The New York State Police, however, ignored both the Defendant's protestation that his conduct was legal and the "official statement" of the New York State Department of Tax and Finance when they seized the native made cigarettes and the truck. Likewise, the People have ignored this "official statement" when they charged the Defendant.

46. Even the Trooper who responded to the call from Federal authorities was confused by the "official statement" regarding tax enforcement. While it was clear that the cigarettes did not have the tax stamp affixed to them, the Trooper failed to arrest the Defendant or his co-defendant as that point. The confusion of the New York State Police over the significance of the "official statement" regarding enforcement in the present situation was further evidenced by several phone calls to superiors requesting instructions on how to proceed and ultimately advising the Defendant that he could return the following Monday to retrieve the seized truck and cigarettes.

47. The Defendant clearly relied on the "official statement" of the New York State Department of Tax and Finance to his detriment and thus all charges against the Defendant should be immediately dismissed.

## POINT IX
## ALL COUNTS SHOULD BE DISMISSED BECAUSE THE STATUTE THE DEFENDANT IS CHARGED WITH VIOLATING IS UNCONSTITUIONAL

48. As the Court is aware, the Defendant has been charged with violating New York State Tax Law Section 1814(c)(2). The applicable section of the statute states:

> Any person, other than an agent licensed by the commissioner, who willfully possesses or transports for the purpose of sale thirty thousand or more cigarettes **subject to tax imposed by section four hundred seventy-one of this chapter** in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale thirty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall by guilty of a class D felony.

49. New York State Tax Law Section 471 states, in relevant part:

> There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, **except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation.** . . . The tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians.

50. Thus, in order for the Defendant to have committed the charged crime, the cigarettes he was transporting must have been subject to tax (i.e., "subject to tax imposed by section four hundred seventy one of this chapter"), not simply lacking stamps.

51. In *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), the United States Supreme Court held:

> We have determined that "[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the **legal incidence** of [the] tax,", and that **the States are categorically barred from placing the legal incidence of an excise tax "on a tribe or on tribal members for sales**

> **made inside Indian country"** without congressional authorization.

*Id.* at 101 (quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995)) (emphasis added).

52. Furthermore, New York State Tax Law states, "**it is intended that the ultimate incidence of and liability for the tax shall be upon the consumer.**" N.Y. Tax § 470 (emphasis added).

53. Thus, cigarettes are subject to New York State taxes only if the legal incidence of the tax falls on a consumer who is not categorically barred from bearing the legal incidence of the tax. When the ultimate consumer is a Native American who purchases cigarettes on his or her own reservation for his or her own use, the State is categorically barred from imposing an excise tax.

54. Despite the existence of an entire category of untaxable consumers, Section 1814 creates a presumption that if the cigarettes are not stamped, they are necessarily subject to tax:

> For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages **shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. . . .**

N.Y. Tax Law § 1814(d) (emphasis added)[1].

[1] As discussed in greater detail below, the unconstitutional nature of this presumption is the result of a poorly drafted statute in which State lawmakers have made arbitrary rules in an attempt to regulate taxation where they have been unable to do so. The arbitrary nature of this statute is clear from the fact that the presumption in Section 1814 makes five thousand cigarettes a threshold of some arbitrary nature. This amount appears to be based on nothing but a mere whim, in a sloppy attempt to collect taxes where the State has been unable to do so for decades. The fact that that five thousand is nothing more than an arbitrary figure is further evidence that the presumption created by Section 1814(d) is unconstitutional.

55. This presumption places the burden on the Defendant to prove his innocence, and relieves the People from having to prove the defendant's guilt. Such burden shifting is only permissible if there is a sufficient connection between the fact to be proven and the fact to be presumed. Specifically, "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, **unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from proved fact on which it is made to depend.**" *Leary v. United States*, 395 U.S. 6 (1969) (emphasis added).

56. Here, the fact to be *proven* by the People is that the Defendant possessed or transported within New York State five thousand or more unstamped or illegally stamped cigarettes at any one time. The *presumed* fact is that these same cigarettes "are subject to the tax imposed by section four hundred seventy one of this chapter." In other words, if the People merely prove that unstamped cigarettes were in the possession of the Defendant, then the Jury may presume the very different fact that the cigarettes would have eventually been purchased by a Consumer subject to the legal incidence of the tax.

57. The ultimate consumer's status as a person subject to tax does not likely flow from the fact to be proven that the cigarettes in the possession of the Defendant were not stamped. Therefore, this presumption must be considered irrational and arbitrary, as it inappropriately relieves the People from proving a defining element of the crime. Thus, the presumption is unconstitutional.

58. The New York State Legislature has explicitly stated that the legal incidence of the tax is to fall on the consumer. Therefore, it is impossible to determine whether cigarettes are taxable without knowing the identity of the consumer. The

Defendant is not a consumer. As an employee of a distributor/wholesaler (Seneca Hawk), his purchase and possession of cigarettes cannot bear the legal incidence of the tax. Again, there is no reasonable connection between simply possessing cigarettes and a determination that the cigarettes will eventually be purchased by a consumer subject to the tax. *See Tot v. United States*, 319 U.S. 463 (1943).

59. In *Tot*, the United States Supreme Court analyzed a statutory presumption in a criminal statute that made it illegal for a defendant convicted of a crime of violence to receive a firearm or ammunition shipped or transported in foreign (interstate) commerce. Pursuant to the statute, the possession of a firearm or ammunition by a defendant was presumptive evidence that such firearm or ammunition was shipped, transported, or received in violation of the Federal Firearms Act. The defendant argued that there was no connection between the fact of possession and its shipment interstate. The State argued that there was such a connection because "in most states, laws forbid the acquisition of firearms without a record of the transaction or require registration of ownership . . . [therefore] mere possession tends strongly to indicate that acquisition must have been in an interstate transaction." *Id.* at 468. The Supreme Court rejected this argument declaring:

> [There is] no reasonable ground for a presumption that its purchase or procurement was in interstate rather than intrastate commerce. It is not too much to say that the presumptions created by the law are violent, and inconsistent with any arguments drawn from experience.

*Id.*

60. The Court went on to state that even if the statute was based on the normal balancing of probability, "it leaves the jury free to act on the presumption alone once the

specified acts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision." *Id.* at 469.

61. In the instant case, the statutory presumption equates possession of unstamped cigarettes with taxability. However, there is no necessary logical connection between these two facts. There is no rational basis to presume that 5,000 unstamped cigarettes possessed by a Native American, traveling between reservations, will inevitably find their way into retail stores where consumers **subject to the legal incidence of the cigarette tax** will finally purchase them. The arbitrary nature of this threshold is evidenced in the notion that the presumption does not apply to an individual who is in possession of one less pack of cigarettes (4,980 cigarettes). Simply put, it cannot "be said with substantial assurance that the presumed fact is more likely than not to flow from proved fact on which it is made to depend" *Leary*, 395 U.S. at 8.

62. In light of the above, insomuch as the presumption the People will rely on is unconstitutional and there is no evidence that the cigarettes in question are "subject to tax", all counts against the Defendant must be dismissed.

## POINT X
## ALL COUNTS SHOULD BE DISMISSED IN FURTHERANCE OF JUSTICE

63. In addition to the above given reasons for dismissal, the Defendant seeks dismissal of all counts in the furtherance of justice, pursuant to New York Criminal Procedure Law Section 210.40.

64. Pursuant to Section 210.40, an indictment or any count thereof may be dismissed in furtherance of justice, as provided in paragraph (i) of subdivision one of section 210.20, when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (h) of said subdivision one of

Section 210.20, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:

(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement;

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(h) the impact of a dismissal on the safety or welfare of the community;

(i) where the court deems is appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

65. Each factor to be considered by the Court falls in favor of the Defendant and the Indictment should be dismissed.

### *A. The seriousness and circumstances of the offense and the extent of harm caused by the offense.*

66. At the outset it is imperative that the Court understands the facts in this case. Here, the Defendant is a member of the Seneca Nation of Indians, working for Seneca Hawk, a business entity wholly owned by members of the Seneca Nation. On March 2, 2012, the Defendant traveled to the Mohawk Indian Reservation in Northern New York and purchased, on behalf of Seneca Hawk, 92 cases of native-made cigarettes from Speedway Cigarettes, which is believed to be wholly owned by members of the St. Regis Mohawk Tribe. The Defendant was on his way back to the Tonawanda Indian Reservation when he was stopped by the U.S. Border Patrol and the truck and cigarettes were seized. Simply put, the transaction here involved only Native Americans and native-made cigarettes.

67. It is undisputed that New York State and the various Native American nations within New York State have struggled for years over the taxability of cigarettes sold by Native Americans on reservations. The legal landscape includes treaties between the various Nations of the Iroquois Confederacy and the United States along with numerous decisions from the U.S. Supreme Court and a recent decision from the Second Circuit Court of Appeals. *See e.g. Wagon Prairie Band of Potawatomi Nation*, 546 U.S. 95 (2005); *Oklahoma Tax Com'n v. Chickawaw Nation*, 515 U.S. 450 (1995); *Moe v. Confederated Salish and Kootenai Tribe of the Flathead Reservation*, 425 U.S. 463 (1976); *Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).

68. In an attempt to tax cigarettes sold on the reservation to non-natives, New York State has developed a new regulatory framework relying on stamping of cigarettes sold to Native Americans. These regulations, however, do not cover cigarettes

manufactured by Native Americans on a reservation. Seemingly recognizing this, the New York State Department of Tax and Finance, the very entity tasked with enforcing these new regulations, has recently taken the position that native made cigarettes should not be seized by law enforcement. *See* **Exhibit B**.

69. As made clear above, on July 6, 2011, Richard Ernst, the Deputy Commissioner of Tax Enforcement issued an "official statement" to various members of the Criminal Investigation Division of the New York State Department of Tax and Finance outlining scenarios involving the movement of untaxed cigarettes in New York State. This "official statement", which the Defendant relied on, made clear that the actions of the Defendant were not to be prosecuted. Simply put, this "official statement" from a high-ranking official in the New York State Department of Tax and Finance clearly establishes that the cigarettes in the present case are not to be seized and those transporting them not charged. In this regard, it is absurd to believe that justice would be served in prosecuting the Defendant.

70. Likewise, the May 16, 2011 letter sent by New York State Senators George Maziarz and Tim Kennedy to Thomas Mattox, the Commissioner of the New York State Department of Tax and Finance makes clear that it is the opinion of the lawmakers that New York Tax law does not have a "**process in place to stamp Native cigarettes in order to effectuate sales tax collection,** as can and is done with so called premium brands." Exhibit C (emphasis added). The State Senators further set out that "**It is our view that Native Brand cigarettes,** which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore **cannot be regulated or taxed by the State of New York.**" Exhibit C

(emphasis added). It is clear from these statements, that even the lawmakers of New York State understand that Native Brand cigarettes are not and cannot be regulated by the State of New York or the Department of Tax and Finance.

71. The official statement of the New York State Department of Tax and Finance, coupled with the legal interpretation of New York State's lawmakers, makes clear that the actions of the Defendant cannot be found to be illegal. Accordingly, dismissal in the interests of justice is warranted.

***B. The Extent of Harm Caused by the Offense.***

72. As explained in greater detail above, any harm assumes that the cigarettes seized by the New York State Police are in fact taxable. The presumption in Section 1814(d), however, is unconstitutional and the burden of proving that the cigarettes are "subject to tax" remains on the People. Insomuch as there is no evidence that the cigarettes here, which were manufactured by, sold by, and purchased by a Native American business, are in fact "subject to tax", there is no harm caused by the alleged offense.

73. Moreover, as explained in Point H below (¶¶89-93), any potential victim to this crime has suffered no harm. As a result, no harm has been caused by the alleged offense and all counts should be dismissed in the interests of justice.

***C. The Evidence of Guilt.***

74. Ignoring for a moment the internal memo of the New York State Department of Tax and Finance, there is no evidence that the Defendant was transporting **taxable** cigarettes. To be found guilty of Tax Law Section 1814(c)(2), the Defendant must have been "willfully" transporting unstamped cigarettes "subject to tax".

Accordingly, regardless of whether or not the cigarettes at issue were stamped, the People must also prove that the cigarettes were in fact taxable. As discussed in detail above, any presumption that the subject cigarettes are subject to a tax is unconstitutional and thus the People are required to prove that the subject cigarettes are "subject to tax". It is respectfully submitted that the People are unable to prove this, as there is no evidence of this fact. As such, dismissal is warranted in the interest of justice.

75. The People will also be unable to prove the Defendant had the required culpable mental state regarding his knowledge of whether the cigarettes were "subject to tax". Tax Law Section 1814(c)(2) includes a culpable mental state of "willfully." New York Penal Code Section 15.15(1) states:

> When one and only one of such terms [requiring a culpable mental state] appears in a statue defining an offense, **it is presumed to apply to every element of the offense** unless an intent to limit its application clearly appears.

*Id.* (emphasis added).

76. Section 1814 includes the element that possessed cigarettes must be "subject to tax". Thus, a defendant's mental state of "willfully" must also apply to the attendant circumstance "subject to tax". Although the New York Penal Code does not specifically define the mental state imparted by the word 'willfully', the state Appellate Court has held "that the Legislature, in using the term 'willfully' . . . intended a culpable mental state generally equivalent to that required by the term 'knowingly'. . . ." *People v. Coe*, 71 N.Y.2d 852, 855 (1988) (internal citations omitted); *see also People v. Einaugler*, 618 N.Y.S.2d 414, 415 (2d Dep't 1994) (citing *Coe*, 71 N.Y.2d 852) ("The trial court instructed the jury that in order for it to find the defendant guilty of **willful** violation of the health laws, it must find that the defendant "willfully committed an act of

neglect" and '**willfully means, knowingly**' . . . ."); *People v. McKelvey*, 2005-KN-050100, 2005 N.Y. Misc. LEXIS 3569, *5 (N.Y. City Crim. Ct. 2005) (holding the People failed to allege the mental state of "willfulness" required by Tax Law 1814(a)(1) regarding the defendant's possession of eight boxes of unstamped cigarettes).

77. In the present case, substituting the defined mental state "knowingly" for "willfully", the People must prove the Defendant "knowingly" possessed cigarettes "subject to tax". The New York Penal Code defines "knowingly" as follows: "A person acts knowingly with respect to conduct or to a circumstance described by a statue defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." N.Y. Penal Code § 15.05(2).

78. Accordingly, the People must prove the Defendant **knew** the cigarettes he was transporting were subject to tax. The Defendant respectfully submits that the People will never be able to do so.

79. The People have failed to provide any evidence of the Defendant's mental culpability regarding the taxability of the unstamped cigarettes in his possession. Furthermore, the Defendant contends that it is impossible for the People to ever provide such evidence. For the Defendant to know whether the cigarettes were subject to tax, he would have needed to look into the future and determine the identity of each and every ultimate consumer, as the legal incidence of the tax remains on the consumer. Just as the charges under Section 1814 were dismissed in *McKelvey* because of the prosecution's failure to allege the requisite *mens rea*, the charges in the instant case should be dismissed because the People have not, and will never be able to, determine the

Defendant's mental state regarding the taxability of the possessed cigarettes. As such, dismissal is warranted in the interest of justice.

80. Alternatively, the People will not be able to show the Defendant **knew** the cigarettes were subject to tax because the only evidence regarding the Defendant's state of mind, the "official statement" by the New York State Department of Taxation and Finance, supports the Defendant's proposition that he knew the cigarettes were, in fact, **not** "subject to tax". The "official statement" advances a policy of non-enforcement characterized by an explicit instruction to **not** seize suspected contraband cigarettes. Given such a policy of forbearance, it is only natural for the Defendant to have assumed that his transportation of Native made cigarettes from one Native reservation to another was in compliance with New York State Tax Law. Based on his knowledge of the Department of Taxation's policy, the Defendant **knew** that his cigarettes were, in fact, **not** "subject to tax". Because Section 1814(c)(2) requires just the opposite, the People cannot prove the mental culpability required by the statute.

***D. The history, character and condition of the Defendant.***

81. Seth Snyder is a twenty-seven year old man with no criminal history. Mr. Snyder lives in Western New York with his wife and three young children, ages five, six, and seven. Mr. Snyder has no criminal history and is an active member of the community. In particular, Mr. Snyder volunteers as a coach for the Lake Shore Junior Football league, where he coaches and instructs children ages seven and younger.

82. Mr. Snyder is additionally a hard worker having worked in his family's business since the age of fourteen. Mr. Snyder, a member of the Seneca Nation of Indians, is also a member of the highly regarded Snyder family. Specifically, Mr.

Snyder's grandfather is Barry E. Snyder Sr., the former President of the Seneca Nation of Indians and the former Chairman of the Seneca Gaming Corp.

83. On the night in question, Mr. Snyder was simply transporting a load of cigarettes, which had been purchased by his employer Seneca Hawk, from the Mohawk Indian Reservation through New York State to the Tonawanda Indian Reservation. At no point did Mr. Snyder believe what he was doing was illegal. Mr. Snyder's character and lack of criminal history clearly establishes that a dismissal in the interest of justice is warranted here.

***F. The Purpose and Effect of Imposing Upon the Defendant a Sentence Authorized by the Offense.***

84. One of the primary purposes of imposing a sentence upon an individual found guilty of certain criminal conduct is to deter similar conduct by others. Assuming the Defendant is convicted here, incarceration or probation will have not act as a broad deterrent. It is expected that the People will argue that a conviction would deter any party who is found guilty of some sort of tax evasion. This argument, however, is misplaced. The truth is that any conviction here would not be looked at by the public in the broad context of tax evasion and instead would be looked at in the context of a dispute between Native Americans and New York State over sovereignty and taxation. In light of this, all charges should be dismissed.

***G. The Impact of a Dismissal Upon the Confidence of the Public in the Criminal Justice System.***

85. A dismissal here would not adversely impact the confidence of the public in the criminal justice system. In fact, it is respectfully submitted that the public would lose confidence in the criminal justice system in the event that the Defendant is

prosecuted. Here there is a known "official statement" from the New York State Department of Tax and Finance which indicates that the actions of the Defendant are not to be prosecuted. Moreover, the Defendant was in possession of and presented this memo to the New York State Police when questioned about the cigarettes being transported. It is clear that the Defendant was under the belief that his actions were not illegal due to the clear and concise statements of an official with the New York State Department of Tax and Finance.

86. Likewise, the letter from New York State Senators Maziarz and Kennedy indicating that as lawmakers they interpret the current regulations as not applying to the present situation must be given great deference. *See* Exhibit C. It would defy notions of fundamental fairness to prosecute the Defendant where two New York State Senators have taken the formal position that the actions of the Defendant are **not** illegal.

87. To prosecute the Defendant in light of these circumstances would erode the public's trust in the criminal justice system, as it would indicate that one cannot trust New York State officials to properly interpret the very laws its citizens are supposed to abide by. These facts clearly support a dismissal in the present case.

***H. The Impact of a Dismissal Upon the Safety or Welfare of the Community.***

88. There is no indication that a dismissal of either of the two counts of the indictment would have any negative impact on the safety or welfare of the community.

***I. The Attitude of the Complainant or Victim with Respect to the Motion.***

89. The Defendant has been charged with violating certain provisions of New York State's Tax Laws, which the New York State Department of Tax and Finance is responsible for upholding. Accordingly, it can be argued that the victim in the present

case is the New York State Department of Tax and Finance. The New York State Department of Tax and Finance, however, has already taken the position that the cigarettes in this matter should not have been seized and in the same regard, the Defendant should not be prosecuted. Clearly, the attitude of the New York State Department of Tax and Finance Defendant warrants a dismissal in the furtherance of justice.

90. The People will likely argue that the victims in the present case are the taxpayers of New York State. As explained above, however, the People cannot prove that the cigarettes at issue here would have ever been taxable. Nevertheless, assuming, *arguendo*, that the cigarettes at issue are taxable and the New York State taxpayers are the victim, a recent study conducted by the Communication Department at Buffalo State College indicates that New York residents do not support the collection by New York State of taxes related to purchases made on an Indian reservation. A copy of this study is attached hereto as **Exhibit D**.

91. Specifically, this study sought to "investigate public opinion about American Indians and the taxation controversy in New York State." *Id.*, at p. 1. At the time of this study the current regulations related to the collection of taxes related to the sales of cigarettes on a reservation were not in place. However, the question posed remains telling. Specifically, the study asked the following: "If there was a sales tax on products purchased on Indian reservations, who should receive the tax revenues?" The study concluded as follows:

> The vast majority of respondents believe that any hypothetical sales tax on reservation purchases should go to Indian tribal government rather than to the state or federal governments.

*Id.*, at p. 6.

92. Likewise, the study concluded that "Support is overwhelmingly strong (79% agree or strongly agree) that the tax-free nature of reservation sales should extend to all purchasers, Indian and non-Indian alike." *Id.*

93. In light of the above, it is clear that even if the cigarettes at issue were proven to be taxable and that this tax revenue would ultimately go the New York State Treasury, the New York State Taxpayers still believe that this tax should not be collected. Clearly, the attitude of the New York State taxpayers, as shown by the above cited study, warrants a dismissal in the furtherance of justice.

***J. Any Other Relevant Fact Indicating that a Judgment of Conviction Would Serve No Useful Purpose.***

94. As explained in detail below, in attempting to enforce the tax regulations here, the People are attempting to force a square peg into a round hole. It is respectfully submitted that the District Attorney's Office is using the Defendant as a pawn in a rogue prosecution in which the District Attorney is attempting to advance her own interpretation of complicated legal issues despite official policy statements of the New York State Department of Tax and Finance and questions regarding ambiguity in the law from New York State's own lawmakers.

95. As stated above, when speaking with the New York State Police, the Defendant provided the officers with a copy of the "official statement" from the New York State Department of Tax and Finance indicating that native-made cigarettes which, like here, were being transported from reservation to reservation within New York State were not to be seized. However, despite being presented with this "official statement",

there is no indication in the investigation notes of the New York State Police involved that the officers ever contacted the New York State Department of Tax and Finance regarding this policy. Instead the cigarettes and truck were seized without any immediate charging of a crime. While not evidence of any serious misconduct, these facts appear to show that the seizure and subsequent Indictment, nearly ten weeks after the seizure, was the result of the New York State Police's failure to follow the official policies of the New York State Department of Tax and Finance, which support a dismissal of all charges.

96. The simple truth remains that New York State has for years attempted to find a way to tax cigarettes on Native reservations. Seemingly unable to enforce consumer compliance, the State has promulgated regulations putting the burden on the Native Americans who distribute and sell cigarettes. However, as made clear in the letter from New York Senators Maziarz and Kennedy, attached as Exhibit C, the State has yet to determine a way to effectively regulate Native cigarettes.

97. Despite this, the State continues to try and craft new ways to target the Native cigarette business. From the public eye, however, this is nothing more than a money grab spurred by the lobbyists in the tobacco industry. The fact that the State attempts to target Native cigarettes but not other Native products like gasoline is the white elephant in the room. This sort of selective enforcement does not benefit the general public, only the special interests in Albany. As such, any conviction here will serve no purpose.

98. Additionally, as indicated above, this Court must consider the complicated and even historic underpinnings that surround the question of taxation of products, including cigarettes and tobacco, by Native American businesses on Native American

territories. Treaties between sovereign Native American entities and the United States, which limit the powers of stated over these sovereign entities and their commerce, were entered into and authorized by Congress as long ago as 1794.

99. More recently, over the last twenty years, there have been numerous decisions by the United States Court which have addressed these sensitive sovereign issues. Likewise, the issue of taxation of goods sold on Native American territories have been vexing and complicated legal and political issues in the State Capital for over two decades.

100. The question of taxation of cigarettes sold by Native Americans is further complicated by the issue of Native American gaming pursuant to the Indian Gaming Regulatory Act ("IGRA") and State Legislature authorized compacts governing IGRA gaming in New York. Likewise, this issue is further complicated by the so-called Master Settlement Agreement ("MSA") entered into by thirty-nine states and the major manufactures of non-native tobacco products, where New York was earmarked to receive $25 billion from these manufacturers.

101. In sum, it is obvious that the question of taxation of cigarettes sold by Native Americans is a legal and political issue that affects the entire State, and therefore requires policies to be promulgated and advanced consistently across the State by State officials, not local officials.

102. Having served as a government prosecutor at the local, federal, and state level for twenty years, your deponent respects and understands the authority of a County District Attorney. However, while your deponent respects the broad authority County District Attorneys possess, a decision to not prosecute certain low-level drug possessory

offenses does not have the same legal and political ramification associated with a single District Attorney interpreting the Tax Law regarding taxation of cigarettes sold by Native Americans.

103. The exercise of such discretion is ever more dubious when the July 6, 2011 "official statement" of the New York State Department of Tax and Finance is taken into account.

104. For all the above given reasons, it is in the interest of justice that this court grant a dismissal of the indictment in its entirety.

**POINT XI**
**ADDITIONAL MOTIONS**

105. No previous application for relief sought herein has been made.

106. Based upon the nature of the relief requested herein, the Defendant reserves the right to make further and additional motions and arguments.

107. Summary relief in favor of Defendant, if the prosecution fails to submit answering papers controverting the factual allegations supporting these motions.

108. In addition to the forms of relief requested herein, your deponent also moves for such other and further relief which may seem just and proper under the circumstances.

WHEREFORE, your deponent respectfully requests that this motion be granted in all respects, together with such other and further relief as this Court deems just and proper.

DATED: Buffalo, New York
July 12, 2012

LIPPES MATHIAS WEXLER FRIEDMAN LLP

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A

STATE OF NEW YORK
COUNTY COURT COUNTY OF ST. LAWRENCE

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

and

SETH A. SNYDER
Defendant.

INDICTMENT NO. 2012- 137
Index No. 21112

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF ST. LAWRENCE, by this Indictment, accuses the above defendant, of the crime of POSSESSION OR TRANSPORTATION OF UNSTAMPED CIGARETTES, Tax Law § 1814(c)(2), a Class D Felony, committed as follows:

The defendant **Seth A. Snyder**, in the County of St. Lawrence and State of New York, on or about 2nd day of March, 2012, acting in concert with , as a person, not an agent licensed by the commissioner, willfully possessed or transported for the purpose of sale thirty thousand or more cigarettes subject to the tax imposed by Tax Law § 471 in any unstamped or unlawfully stamped packages, to wit: at the aforesaid date and place, the defendant not an agent licensed by the commissioner, willfully possessed and transported for the purpose of sale over 30,000 cigarettes, subject to the tax imposed by Tax Law § 471, in unstamped packages.

## SECOND COUNT

THE GRAND JURY OF THE COUNTY OF ST. LAWRENCE, by this Indictment, accuses the above defendant, of the crime of POSSESSION OR TRANSPORTATION OF UNSTAMPED CIGARETTES, Tax Law § 1814(c)(2), a Class D Felony, committed as follows:

The defendant in the County of St. Lawrence and State of New York, on or about 2nd day of March, 2012, acting in concert with Seth A. Snyder, as a person, not an agent licensed by the commissioner, willfully possessed or transported for the purpose of sale thirty thousand or more cigarettes subject to the tax imposed by Tax Law § 471 in any unstamped or unlawfully stamped packages, to wit: at the aforesaid date and place, the defendant not an agent licensed by the commissioner, willfully possessed and transported for the purpose of sale over 30,000 cigarettes, subject to the tax imposed by Tax Law § 471, in unstamped packages.

Dated: May 3, 2012

FOREPERSON

NICOLE M. DUVÉ
St. Lawrence County District Attorney

B

From: Peter Persampieri/ENFORCEMENT/NYSTAX
To: CID Investigators, CID Supervisors

Date: Wednesday, July 06, 2011 09:41AM
Subject: Fw: Cigarette Enforcement

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Please carefully read these scenarios and follow them. If there are any questions please contact your Chief Investigator.

Peter Persampieri
Director of Investigations
Criminal Investigation Division
NYS Department of Taxation and Finance
1740 Broadway (17th Floor)
New York, NY 10019

Office (212)459-7826 Blackberry (917) 932-4230
----- Forwarded by Peter Persampieri/ENFORCEMENT/NYSTAX on 07/06/2011 09:39 AM -----

From: Richard Ernst/EXEC/NYSTAX

To: Patrick Slmet/ENFORCEMENT/NYSTAX@NYSTAX, John Connolly/ENFORCEMENT/NYSTAX@NYSTAX, Scott Amaral/ENFORCEMENT/NYSTAX@NYSTAX, Christopher Lanson/ENFORCEMENT/NYSTAX@NYSTAX, Peter Persampieri/ENFORCEMENT/NYSTAX, Carl Cheek/ENFORCEMENT/NYSTAX

Cc: Janice Woodward/EXEC/NYSTAX

Date: 07/05/2011 09:17 AM

Subject: Cigarette Enforcement

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**Possible scenario's involving the movement of untaxed cigarettes in NYS (either premium alone, premium and native American or just native American) and when we could seize and/or charge.**

Native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS. - **Don't seize**

Native Americans transporting untaxed native American cigarettes from a reservation outside of NYS to a reservation inside NYS. **Don't Seize at this time. This may be the first type of Native American cigarettes that we seize.**

Native Americans transporting untaxed native American cigarettes from a reservation inside of NYS to a reservation outside of NYS.

Don't Seize

(Same three scenario's above but with premium brands or a split load of native brands and premium brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

Non native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS. **Don't seize**

Non native Americans transporting untaxed native American cigarettes from a reservation outside of NYS to a reservation inside NYS.
**Don't seize at this time. This may be the first type of Native American cigarettes that we seize.**

Non native Americans transporting untaxed native American cigarettes from a reservation inside of NYS to a reservation outside of NYS.
**Don't seize.**

(Same three scenario's above but with premium brands or a split load of native brands and premium brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

Non native Americans transporting untaxed native American made cigarettes from one reservation in NYS to anywhere in NYS.
**Don't seize**

(Same scenario as above but with a split load of premium's and native brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

Non Native Americans, Middle Eastern and Foreign Nationals running a business in NYS and who are found selling untaxed native American made cigarettes at retail outlets such as bodegas etc.
**Seize the untaxed cigarettes whether they are premium or Native American brand .**

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NEW YORK
STATE
SENATE
ALBANY, NEW YORK 12247

May 16, 2011

New York State Department of Taxation and Finance
Commissioner Thomas H. Mattox
Building 9, State Campus
Albany NY 12227

Dear Commissioner Mattox:

We write in today in reference to the regulations that have been issued for the collection of New York State Sales Tax on Native territories for sales of tobacco products made to individuals who are not Native Americans. In reading these regulations, it is clear that the issue of the sale of Native Brand cigarettes and tobacco products, which are produced on Native territories, are not addressed.

A call to your office yielded the response that this is a "gray area". We respectfully disagree. There is currently no process in place to stamp Native cigarettes in order to effectuate sales tax collection, as can and is done with so called premium brands. It is our view that Native Brand cigarettes, which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore cannot be regulated or taxed by the State of New York. This issue is completely separate and apart from the Departments and the Courts contention that sales tax can and should be collected for the sales of premium brands to non-Native individuals, even when such sales are made on Native territories.

It is our view that the State should not pursue an effort to collect taxes on Native Brands because such an effort would be contrary to the sovereign rights of the Native American Nations, and would be a severe blow to the Native retail economy.

Since the regulations issued in the wake of the recent court ruling are silent on this issue, we request that you provide clarification to us as soon as possible and in writing. It is very important that all of the citizens of the State of New York and their elected representatives know what the intention of your Department is with regard to the collection of State taxes on Native Brand cigarettes and tobacco products.

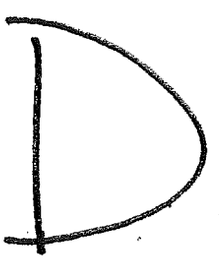
We look forward to your timely reply and toward working with you to resolve this important issue.

Sincerely,

George D. Maziarz
Senator George Maziarz
Senate District 62

Timothy M. Kennedy
Senator Tim Kennedy,
Senator District 58

GDM:mn



# *Public Opinion*

## *on American Indians & Taxation Issues in Western New York*

*Focus Groups, Survey & Content Analysis*

*A Three-Stage Research Project*

*Conducted by the Communication Department of Buffalo State College*

Report June 2005

Ronald D. Smith. Chair: Communication Department

# Introduction

During Spring of 2005, three professors in the Communication Department at Buffalo State College orchestrated a major research undertaking to investigate public opinion about American Indians and the taxation controversy in New York State.

The professors supervised 15 Upper-Division students in their Communication Research class (COM 401). These students designed and carried out a coordinated series of research projects to determine public opinion in Western New York about American Indians in general and specifically on the issue of taxation of products and services on Indian land.

Three separate coordinated research projects were conducted:

- Dr. Marian Deutschman, professor of public communication, coordinated a focus group project. Students designed and conducted four focus groups totaling 29 participants to obtain a preliminary understanding of the issues involved.
- Ronald D. Smith, professor of public communication and department chair, directed a survey project. Students designed and implemented a survey of 426 respondents with 22 questions informed by the focus group discussions.
- Dr. W. Richard Whitaker, professor of broadcasting and journalism, supervised a content analysis project. Students designed and conducted a content analysis of 250 newspaper articles and an additional 80 article abstracts.

This report by Professor Smith includes a report with findings on each of the research projects, followed by general conclusions based on the three studies, with recommendations growing out of the research.

These projects were conducted at the invitation of the American Indian Policy and Media Initiative, a grant-funded activity of the Buffalo State Communication Department. Co-directors for the initiative are R. Timothy Johnson and Dr. José Barreiro.

Ronald D. Smith APR

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# Executive Summary

**Research Project 1: Focus Groups.** Four parallel focus groups conducted with Western New York adults yielded a generally positive profile of a citizenry that can best be described as friendly and open toward Indian issues.

- The research shows a widespread posture of interest in and support for Indian issues, though amid an environment that is relatively uninformed.
- A positive link exists between personal familiarity with Indians and support for Indian issues. Familiarity most often is based on patronization of vendors and services on Indian reservation land.
- Some people believe that it is unfair to Indians to take advantages of their untaxed goods and services because outsiders don't deserve them.
- The concept of treaties evokes two responses: one, that they should be respected; two, that perhaps they should be updated.
- Likewise, the concept of sovereignty yields to two opinions: one, that Indian self-government should be respected; two, that the state should be able to intervene for the good of the larger public.
- Peripheral issues such as the establishment and management of gaming venues sometimes cloud the more central issues of treaty obligations and sovereignty rights.

**Research Project 2: Survey.** A 426-respondent survey conducted with Western New York adults echoed the general support observed in the focus groups and provided specifics.

- Current public opinion seems decidedly pro-Indian on many of the issues investigated through these research projects, particularly respect for treaty provisions.
- Concurrently, public opinion seems decidedly against some of the positions proposed or taken by state government on many of the tax-related issues. Surprisingly absent from the research findings was any significant we-all-should-pay-taxes notion. Additionally, the feeling was strong that, if there were to be taxation on sales on Indian lands, tribal governments should receive the tax revenues.
- Gender is not a significant factor in support or rejection of what would commonly be considered a pro-Indian position on various issues.
- Surprisingly, neither is political leaning a significant factor in most situations. At least two-thirds of political liberals, moderates and conservatives support the notion that treaty provisions prevent state taxation of all sales on Indian lands.
- Predictably, higher levels of education are associated with support for Indian issues.
- Ethnicity is not a significant factor in support of Indian issues. An exception to this generality is that there is notably more support for maintaining treaties in their original form among ethnic minorities (56%) than among Caucasians (48%).

- Age is not a serious dividing point in support for Indian issues, with significant support throughout each age group. Continuing availability of untaxed sales to non-Indians is favored by people under 30 (83%) only slightly more than those 30-45 (77%) and those over 45 (75%). Additionally, persons over age 45 were slightly more likely to support keeping treaties in their original form rather than updating them.
- However, age is a potential factor, since younger people reported having less information about Indian issues, though no less support for Indian issues. Concurrently, younger people expressed openness to knowing more about Indians.

**Research Project 3: Content Analysis.** A preliminary content analysis of five newspapers in Upstate New York reveals a journalistic environment somewhat out of step with the generally pro-Indian public opinion observed in the previous two research projects. Newspapers are more likely to accept assertions by New York State public officials that the state has a right and ability to collect taxes on purchased by non-Indians on Indian lands.

This research project also suggests that Indian entities might take advantage of their proximity to metropolitan newspapers in obtaining a public platform for their voice. More importantly, Indians can impact reporting by developing their voices with a pro-active effort to engage reporters and editorial writers. Media training and a communication/public relations infrastructure are elements of this potential impact.

# Focus Group Research

## *Introduction*

Research Question: What is public opinion in Western New York about American Indians in general and specifically about the issue of taxation of products and services on Indian land.

Research Team: This research was conducted within an advanced class in Communication Research (COM 401) at Buffalo State College. Three professors, each with academic and professional experience in research, oversaw and coordinated the project. This particular project was administered as a set of four parallel projects for the class.

Discussion Guide: An 11-item discussion guide was developed, pre-tested and revised. See Appendix A.

Population: A population of adult non-Indian residents of Western New York was identified. This geographic area was selected because of its proximity with several Indian reservations.

Sample: A quota sample was established, with equal representation among men and women. Additionally, a quota sample of 75% Caucasian and 25% ethnic minorities was established to provide as wide an ethnic mix as possible. Within these quote samples, the discussion guide was used with a convenience sample of respondents in the population profile.

Approximately 40 persons were invited; 29 participated – a satisfactory yield for such research. Participants reflected a mix of 17 men and 12 women, for a ratio of 59% to 41%, appropriately within the established 50-50 parameters. Only 7% were members of ethnic minorities, less than had been sought. Each session lasted 1 - 1½ hours.

- Group 1 included 4 men and 4 women. One participant was African American; the others were Caucasian. Ages ranged from 20 to 58. Occupations included professionals, service personnel, laborers and students. Food incentive (chicken wings and beer).
- Group 2 included 3 men and 3 women. One participant was African American; the others were Caucasian. Ages ranged from 25 to 56. Occupations included professionals, service personnel and laborers. No incentive to participate.
- Group 3 included 5 men and 4 women. All were Caucasians. Ages ranged from 23 to 52. Occupations included students, service personnel and laborers. No incentive to participate.
- Group 4 included 5 men and 1 woman. All were Caucasians. Ages ranged from 21 to 50. Occupations included professionals and students. Food incentive (pizza and soft drinks).

Timing: The questionnaire was administered in early March 2005.

Location: The four separate focus groups were convened at various locations. Each session was recorded with video and/or audio equipment.

Incentives: Participants in the focus groups were not paid. Two groups provided refreshments of food and beverage.

# *Findings and Observations of Focus Group Project*

**Focus Group Discussion Item 1. When you think of the term "Native American" or "American Indian," what images come to mind? What is the source of your information?**

Group 1: This group seemed comfortable discussing stereotypes, with initial responses such as "teepees," "totem poles," "head dresses," "cheap cigarette and gas," "poverty," "alcoholism," and names of famous landmarks and cities. Others in the group agreed with such stereotypes and images. As discussion became more intense, the topics led to images of Native Americans. The participants identified the source of such stereotypes as images they had learned in elementary school.

Participants from Tonawanda, Niagara Falls and Ithaca said their personal proximity to Indians and reservations gave them insight, which some presented as empathy. "Natives have every reason to resent us," said one. Others disagrees; one man scratched the back of his neck and said, "They have resisted assimilation by isolation and separation from society."

Group 2: One person said that "people think all Native Americans do is drink and party," but her best friend, who is Indian, is a hard worker. Another had an Indian relative, and still another is married to a man from Gowanda, where many Indian live; both had positive feelings but were aware of negative stereotypes. Beyond personal experience, most said their information comes through the news media. Others said the got most of their information from Indians from textbooks they had read in school. Most said they believe Indians are not well represented in the media, where most reports about Indians are generally in a negative context.

Group 3: Most members of this group said they think of physical features: Indians as being tall, broad bone structure, long dark hair, well built, with little emotion showing on their faces. One woman said the first thing she thought of was "wisdom" and she perceived Indians as being humble and wise people oriented to nature and family.

Group 4: Stereotypes mentioned included "bows and arrows," "casinos" and "reservations." One person mentioned old television commercials with an Indian crying because people had ruined the environment. "Trail of tears" was the final example given in this group.

**Focus Group Discussion Item 2. Do any popular Native American figures come to mind?**

Group 1: The group mentioned Indian "warriors" such as Geronimo, though one member of the group said she didn't know who Geronimo was. Disney was mentioned, and several identified "Disney-fed" images such as Pocahontas, which the group considered apart from any historical context. One person asked if Pocahontas was a real person, and two others said they didn't know. A few members seemed to know a lot about Pocahontas and her historical reality.

Group 2: This group mentioned Geronimo, Red Jacket, and "the current Indian senator" whose name they could not recall.

Group 3: Though this group noted that few popular images of Indians exist, everyone mentioned Tonto. Historic figures mentioned were Pocahontas and Geronimo. One person mentioned "President Shindler of the Seneca Nation Casino."

Group 4: Participants really had to think about their answers, finally coming up with responses such as Crazy Horse, Sacagawea and Pocahontas.

**Focus Group Discussion Item 3. What does the term "treaty" mean to you?**

Group 1: This was the first discussion topic to make participants visibly uncomfortable. A few members of the group who said they were aware of current Indian public policy issues were first to enter the discussion. One person defined a treaty as "an agreement between two or more people." He continued: "The Native American treaties have been broken several times throughout history. Everyone else has to back up treaties, but the American government doesn't feel that they have to honor them."

Another panel member said that things change all the time, but that treaties should not be changed unless all parties agree. At this point, more reticent members of group began to participate. One woman said: "The treaties should equally change on both sides. Who knows? If the treaties are re-worked, it might bring in more tax revenue for both parties involved." Other members of the group indicated that they were ignorant of the issue and had nothing to contribute to the discussion.

Group 2: One person said a treat is an "agreement between people" that should be kept. Another called it "an unbroken promise by the government," though one person observed that "all the promises the government made have not been kept."

Group 3: Every participant has a quick and simple answer, with "agreement" and "contract" being most frequently mentioned. Participants in this group agreed that the term refers to a contact between the federal government and Native Americans.

Group 4: This group was confused as to the meaning of treaties. One person said the term means "no fighting" and another person said it means "compensation for the loss of something of value."

**Focus Group Discussion Item 4. What rights do Indians have according to treaties? Should old treaty rights continue today?**

Group 1: This item forced a continuation of the discussion from the previous item. One member said he did not "feel educated enough on what their rights are to answer the question." Others began to drift off into tangential issues such as education on reservations and police enforcement there. One member attempted to return to the topic by observing that "we just can't learn about them because they have isolated themselves for so long."

Group 2: One person observed that the Indians are a sovereign nation and as such "they don't get taxed, we do." Another person said she wishes she were an Indian because "they get lots of free stuff. They are entitled to some, but they get more than they should." One woman responded that "anything they get they are owed." Another woman said that "the White Man does not give Native Americans a fair shake," adding that she wished she were better educated on the topic.

Group 3: Participants agreed that Indians hold certain rights according to treaties, including the rights to government their own land and allow Indians to have their individual leaders. The group also agreed that old treaties should continue in force today.

Group 4: Discussion became heated when one participant said treaty rights should continue, and another said it was "in the past." Another said it was unfair for Indians to have rights today just because their ancestors did. In response to this last point, at least one member folded his hands, leaned back, and withdrew from the discussion.

**Focus Group Discussion Item 5. Should the government be able to change treaty provisions?**

Group 1: Continuing the line of discussion focused more on opinion than fact, the group was able to engage the topic. One member said: "Absolutely. Look at the economy of Buffalo right now. We are in desperate need of financial help from somewhere." Several other participants picked up the discussion, indicating support for the notion that treaties should be updated. Members who previously had identified themselves as being knowledgeable on the history of Native Americans seemed appalled by this notion that treaties should be changed. They discussed past incidents of genocide.

Group 2: One participant said that Indians "should benefit from old laws." The discussion then detoured into how Indians use their resources. One woman said that "their wealth should be equally distributed in Gowanda and Angola," to which another woman responded: "You could say that about others, the way wealth is distributed."

Group 3: Though participants in this group mentioned in the discussion item above that treaties should be honored, half of this group believed that the government should update treaties to what they considered "today's standards." They also believed that the state has a right to intervene with current treaties, updating and changing them. "The state makes decisions for the rest of New York citizens, so why not Native Americans?" Yet the other half remained adamant that treaties, as contracts, cannot be changed unless the federal government revises them.

Group 4: Participants seemed unwilling to answer this question and gave no real response to it.

**Focus Group Discussion item 6. Have you ever used an Indian reservation? How do you perceive their culture? Their economic development?**

Group 1: Introduction of this new topic of discussion energized the group. Members listed tobacco as their top reason for visiting a reservation. Gasoline was the second most-common reason. Members of the group who do not smoke said they have no reason to visit the reservation, and two members said they felt that they didn't have the right to shop tax-free on Indian property. Those who had visited a reservation said they know something about Indian culture, but not as much as they should. Most participants seemed uncomfortable even in acknowledging their lack of information about Indian culture. Some said they would like to know more.

In discussing Indian economic issues, the group had few positive impressions. Poverty was a commonly acknowledged stereotype, with one participant blaming television for giving Indians a poor representation. "Poor schooling, high rates of alcoholism and excessive gambling are the only things that I see or hear when Natives are mentioned on TV."

Group 2: One man said he didn't think he'd ever been on a reservation, though he may have driven through. Another man responded that "it's a regular town that they run on their own."

Group 3: Some participants said they purchase cigarettes and gas on reservations. One said her job includes fundraisers and some medical exams on a reservation. Several comments were negative: "The reservation is a No Man's land, bare and lawless." "They are alcoholics and drug dealers." "I heard they have a high teen suicide rate." One person said he lives next to a reservation "and I haven't seen any new development other than the gas and tobacco store."

Group 4: Discussion once again became heated as participants traded stories of their perception of Indian culture. One person said he went to the reservation for cigarettes; another said he wouldn't buy there because the cigarettes were not of good quality. Another man said reservations were bad pieces of land, and when he thought of the culture only alcoholism and poverty came to mine.

**Focus Group Discussion Item 7. How do you see Native American impacting American life?**

Group 1: Participants had few ideas of how Indians impacted them personally, a situation they said was partly due to the lack of assimilation of Native culture. One member said Indians were "shafted," which he said may be the reason for their seclusion because "they simply don't trust us." Another person identified areas of folk medicine as one of the contribution of Indian culture for the rest of American society.

Another said that lack of Indian visibility creates a vacuum in which stereotypes flourish. One member posed the question: "Do they even want to have impact on our society? If they do not want to share their value, then who are we to force them?" Several members indicated that perhaps Indians are content with their representation to white society and would rather continuing thinking of themselves as outcasts.

Group 2: Participants in the group were crisp in their responses: "gas and cigarettes" and "nice crafts." One many observed that Indians "have better ideas," though he did not elaborate.

Group 3: "They don't affect me," said one participant. Another said: "Indians are always trying to get land that non-Indians live on. What are those people supposed to do – just get up and move away?"

Group 4: The participants looked from one to another. Finally, one participant said that Indians will not affect "American life" because no one cares.

**Focus Group Discussion Item 8. How do you feel about the Native American communities being sovereign nations, with their own set of laws within the United States?**

Group 1: At first, members of the group looked bewildered by the question and hesitated in responding. Some members knew the background and said that if a treaty were made allowing Indians to be their own independent nation, then it should be upheld. Some members needed a definition of "sovereign" because they participated in the discussion.

Group 2: One man said that Indians retain their own culture. One woman said she had "been to Cattaraugus during election day and everyone voted." The discussion detoured into the issue of taxation, whether non-Indians vote, particularly whether young people care about public issues and take time to vote or even express their opinions.

Group 3: This group addressed the question negatively. One man discussed a rape case in Syracuse in which an Indian raped a girl off the reservation, but police could not arrest him because he was on sovereign land and reservation police would not deal with him. Another talked about drug activity on a reservation as well as alleged incidents in which cars have been stolen by Indians and taken to reservations where police could not go to retrieve the stolen cars. "I think that the government should have regulation on the reservation," he concluded.

Group 4: This question seemed to hit home for one participants, who said Indians have certain rights no matter what. He told the story, hear from a friend in the military, who had witnessed a fight in which an Indian beat up another soldier but was not disciplined, presumably because he was Indian. The storyteller was visibly upset. Another participants said the Indian communities are closed, yet they want people to welcome them. Someone else mentioned the cliché of having your cake and eating it too. One participants said Indians should not have their own laws, and other responded that at least some treaty rights should be taken away.

**Focus Group Discussion Item 9. Have you made any purchases on the reservation within the last year? If so, how often? Why?**

Group 1: A few members said they made a point of visiting the reservation to purchase tobacco, but not very often. Several said they felt it was wrong to buy on a reservation, specifically because it seems wrong for non-Indians to take advantage of tax-free sales. "Only Natives should get to benefit from the treaty that was made for them," said one. Another added: "I feel like we're robbing them of their stuff."

Group 2: One woman said she purchases gas and trinkets, and a man said he often buys lunch on a reservation. But another observed that "it doesn't make sense to make the trip just for gas."

Group 3: Several members said they purchase gasoline and cigarettes at a reservation. One man travels there once a week.

Group 4: Participants said they rarely purchase good from reservations; when they do it is cigarettes and gas because these were less expensive than off-reservation purchases. When one participant said she bought gasoline on the reservation, another warned that the gas is inferior and bad for cars.

**Focus Group Discussion Item 10. Do you support New York State proposals to tax purchases made by non-Native Americans on reservations?**

Group 1: At first, the group was divided regarding the tax question. Some were concerned with the underlying problem of breaking a treaty. The majority agreed that non-Indians should pay taxes on reservation sales because only Indians should be the beneficiaries of the treaty provisions. However, each member of the group agreed that the state government should not change the rules to meet its needs.

Group 2: This group generated no discussion of this question.

Group 3: Several participants in this group predicted dire consequences for Indian shops if taxes are imposed. "Nobody will buy from there unless it is closer than any other store," said one member. "It would probably ruin almost all of their current business," said another. Still another echoed: "People go there because it is tax-free, which makes their products so much cheaper. Take that away and no one will go."

Group 4: Most participants said they did not support the proposition. One person explained that non-Indians should be taxed to support the state, adding that Indians also should be taxed because they do not support the United States, so the U.S. in turn should not support them.

**Focus Group Discussion Item 11. Is there anything else you would like to add to our discussion on Native Americans?**

Group 1: In this wrap-up discussion, participants recapped their views of the state government trying to make change without permission or authority.

Group 2: The woman with an Indian friend said "American should visit; you'll be welcomed. They do more than just sell cigarettes and trinkets." One man said he's not well-informed on the subject but knows there is more to Indians than just the stereotypes. One woman said that "Indian culture should be saved; Pataki is trying to divide."

Several participants discussed their own places of employment and the relatively few minorities with whom they work. One woman said "diversity and opinions are important," and a man said he needs more education about culture and other issues.

Group 3: This group expressed some ambivalence for Indian concerns. "The government gave a piece of crap land 200 years ago. Why not just have them be the same as we are today?" asked one. Another said: "It's all about money" without elaborating.

Group 4: One participant told the group about a book by the first Navajo Indian female doctor.

# Survey Research

## *Methodology*

Research Question: What is the public opinion in Western New York about American Indians in general and specifically about the issue of taxation of products and services on Indian land.

Research Team: This research was conducted within an advanced class in Communication Research (COM 401) at Buffalo State College. Three professors, each with academic and professional experience in research, oversaw and coordinated the project. This particular project was administered as a joint project for the entire class.

Questionnaire: A 22-item questionnaire was developed, pre-tested and revised. See Appendix B.

Population: A population of adult non-Indian residents of Western New York was identified. This geographic area was selected because of its proximity with several Indian reservations.

Sample: A quota sample was established, with equal representation among men and women. Additionally, a quota sample of 75% Caucasian and 25% ethnic minorities was established to provide as wide an ethnic mix as possible. Within these quote samples, the questionnaire was administered to a convenience sample of respondents in the population profile.

Yield: The 15 students in the class each administered the questionnaire to 30 respondents, yielding as total of 426 completed and usable questionnaires. Of the respondents, 70% were Caucasian, 26% various ethnic minorities, and 4% unreported, results compatible with the desired sample.

Timing: The questionnaire was administered in late March 2005.

Location: The questionnaire was administered in various public locations selected to present a wide mix of members of the population. These locations included a post office, library, department store, specialty stores, coffee shops, airport passenger terminal, and bus terminal, as well as a reservation smoke shop.

Reliability. Social science research generally is evaluated on the basis of an acceptable confidence level within a margin of error, indicating how certain the researcher is in the accuracy of the data. A 95% confidence level is considered optimum for research such as this project, indicating that if the study were conducted 100 times, the results would be the same 95 times, within a predictable margin of error. With its sample of 426 within a population base of 10 million for Upstate New York, this research project achieves the 95% confidence level with a 4.75% sampling error (that is, a margin of error of $\pm 4.75$).

# *Findings and Observations of Survey Project*

Survey Item 1. In what county do you live?

| | | | |
|---|---|---|---|
| a. | Erie | 68% | n=289 |
| b. | Niagara | 13% | n=57 |
| c. | Monroe | 6% | n=27 |
| d. | Other | 12% | n=52 |

*This item was included to establish the geographic parameters of the population.*

- Among respondents, 87% are residents of Western New York counties, and a majority of respondents of the "other" category were in WNY counties.

Survey Item 2. Where do you get most of your local and state news?

| | | | |
|---|---|---|---|
| a. | Newspaper | 28% | n=118 |
| b. | Television | 44% | n=186 |
| c. | Radio | 7% | n=31 |
| d. | Internet | 8% | n=33 |
| e. | Other people | 3% | n=13 |
| f. | Other/mixed | 10% | n=43 |

*These 2 items were included to gain insight into media habits of respondents.*

- The majority of Caucasians (n=247) receive their information from television (43%) or newspapers (31%). However, ethnic minorities (n=125) are more likely to get their news from radio (47%) than from either television (19%) or newspapers (17%).
- 47% of respondents 30 or younger gain their news from television, compared to 43% of those 30-60 and 41% 60 and older.
- 41% of older respondents gain their news from newspapers (equal to that of television). But only 32% of respondents in the mid-range of age are newspaper readers. And only 17% of younger respondents read newspapers.
- Younger respondents (11%) and mid-age respondents (9%) cite higher-than-average use of the internet for new.

Survey Item 3. How aware do you think you are about local and statewide current events?

| | | | |
|---|---|---|---|
| a. | Very aware | 23% | n=100 |
| b. | Aware | 61% | n=260 |
| c. | Unaware | 15% | n=58 |
| d. | Very unaware | 1% | n=5 |

- Self-reports of awareness are similar across ethnic lines, with 83% of Caucasians and 87% of minorities identifying themselves as being aware or very aware.
- Men (89%) are somewhat more likely than women (81%) to report awareness.
- Political liberals (81%) are less likely than moderates (87%) and conservatives (89%) to report awareness of current events.
- Younger adults (77%) and persons with household incomes less than $30,000 (79%) report less awareness than average (84%).

Survey Item 4. How close to you live to an Indian reservation?

| | | | |
|---|---|---|---|
| a. | Less than 10 miles | 15% | n=66 |
| b. | Between 10 and 25 miles | 41% | n=175 |
| c. | More than 25 miles | 28% | n=119 |
| d. | Don't know | 15% | n=66 |

*The following 4 items were analyzed together to determine the significance of reservation shopping opportunities.*

- A majority (56%) of respondents live within 25 miles of a reservation.
- Most respondents (85%) know where they live in proximity to a reservation.

Survey Item 5. How often do you shop on an Indian reservation?

| | | | |
|---|---|---|---|
| a. | At least once a week | 10% | n=44 |
| b. | At least once a month (but less than once a week) | 12% | n=51 |
| c. | Several times a year (but less than once a month) | 16% | n=68 |
| d. | Never or almost never | 62% | n=262 |

- Reservation shopping drops with higher household income. 24% of respondents with incomes below $30,000 and 26% with incomes between $30,000 and $60,000 shop weekly or monthly; but only 17% of those with incomes above $60,000 shop that often.

Survey Item 6. (Skip this question if you answered "never" in #5 above)
If you do shop on a reservation, what is your main reason?

| | | | |
|---|---|---|---|
| a. | To support American Indians | 16% | n=26 |
| b. | Because it is close by and/or convenient | 15% | n=25 |
| c. | To save money | 64% | n=107 |
| d. | Other | 5% | n=9 |

- The most common reason respondents give for shopping on a reservation is to save money.
- A notable minority of respondents (16%) target reservation shops in order to support Indian businesses. This notion is particularly strong among ethnic minorities (24%), college-educated people (22%), and political liberals (22%).

Survey Item 7. How many American Indians do you count as acquaintances, friends or family?

| | | | |
|---|---|---|---|
| a. | None | 50% | n=211 |
| b. | One | 17% | n=72 |
| c. | Two to five | 27% | n=115 |
| d. | More than five | 6% | n=27 |

- The is a strong link between shopping on reservations and knowing Indians; 66% of shoppers said they have at least one acquaintance who is Indian
- Conversely, 41% of people who do not shop on reservations have no Indian acquaintances.

*The following 6 items deal with public opinion on issues of taxation and sovereignty.*

**Survey Item 8. Which of the following statements is closest to your opinion?**

a. Treaties between the federal government and Indian tribes should be followed as they were written. 50% n=214

b. Treaties between the federal government and Indian tribes should be updated. 50% n=211

- A strong and positive link exists between shopping on reservations and support for the opinion that treaties should be followed as written; 65% of shoppers held this opinion, while only 41% of non-shoppers hold that view.
- Though most respondents were split on this issue, other pockets of minimal support for maintain treaties as written are found among lower-income people (62%), males (61%), ethnic minorities (56%), and college educated persons (55%).

**Survey Item 9.** (Skip this question if you selected the first statement in #8 above)
**At whose request should the treaties be renegotiated?**

a. Indian tribes 42% n=89
b. New York State 27% n=57
c. Federal government 30% n=62

- Support is significantly strong for a hypothetical situation in which Indian tribes initiate a renegotiation of treaties, rather than renegotiation initiated by state or federal governments. Slightly more support comes from ethnic minorities (56%) and from people who shop on reservations (45%).
- In terms of political leaning, support for renegotiation at Indian request comes from liberals (54%), moderates (41%) and conservatives (25%), with the conservatives giving greater support for renegotiation at the request of the state (35%) and the federal government (40%).

**Survey Item 10. By federal law and treaties, sales of products and services on Indian reservations are not subject to state tax. Which of the following statements is closest to your opinion?**

a. This policy should apply to both Indians and non-Indians. 69% n=291
b. This policy should apply only to Indians 31% n=129

- Support is strong throughout all break-out demographics for a policy of extending tax-free purchases to non-Indians.
- Support is particularly strong (76%) among people who shop at reservation stores and people younger than 30 (71%).
- There is little disagreement among respondents of various political leanings. Support for the polity applying to both Indians and non-Indians is 71% among liberals and 66% among both moderates and conservatives.

Survey Item 11. **If there were a sales tax on products purchased on Indian reservations, who should receive the tax revenues?**

| | | | |
|---|---|---|---|
| a. | New York State government | 24% | n=100 |
| b. | Indian tribal government | 68% | n=291 |
| c. | Federal government | 7% | n=31 |

- The vast majority of respondents believe that any hypothetical sales tax on reservation purchases should go to Indian tribal government rather than to the state or federal governments.
- Support for revenues going to tribal government is stronger than average among persons with household incomes lower than $30,000 (73%), ethnic minorities (72%), and younger adults (71%).
- There is little difference among various political leanings. Support for tax revenues going to tribal government is consistent among political liberals (71%) as well as moderates and conservatives (both at 67%).

Survey Item 12. **American Indians should continue to govern themselves, independent of the state.**

| | | | |
|---|---|---|---|
| a. | Strongly agree | 32% | n=137 |
| b. | Agree | 49% | n=210 |
| c. | Disagree | 15% | n=64 |
| d. | Strongly disagree | 3% | n=13 |

- Support is overwhelmingly strong (81% agree or strongly agree) in the opinion that Indians should remain sovereign. Support is particularly strong among people who shop on reservations (93%).

Survey Item 13. **Non-Indians should be able to benefit from tax-free items and services sold on Indian reservations.**

| | | | |
|---|---|---|---|
| a. | Strongly agree | 38% | n=160 |
| b. | Agree | 41% | n=175 |
| c. | Disagree | 17% | n=71 |
| d. | Strongly disagree | 5% | n=20 |

- Support is overwhelmingly strong (79% agree or strongly agree) that the tax-free nature of reservation sales should extend to all purchasers, Indian and non-Indian alike.
- Not surprisingly, this proposition gained its strongest support from people who shop on reservations (89%). However, was only a little less than average among non-shoppers (72%).

Survey Item 14. How aware do you think you are about American Indian society, culture and history?

| | | | |
|---|---|---|---|
| a. | Very aware | 9% | n=37 |
| b. | Aware | 47% | n=199 |
| c. | Unaware | 38% | n=161 |
| d. | Very unaware | 7% | n=29 |

*The following 3 items were included to test general knowledge of relevant issues.*

- Barely a majority of respondents (56%) report a positive level of awareness of Indian issues.
- Reservation shoppers were significantly more likely than non-shoppers (69% to 47%) to re-post that they were aware or very aware of Indian issues.
- Self-reporting of awareness increased with age: 51% of those 30 or younger, 55% age 30-60, and 64% older than 60.

Survey Item 15. What does the word "sovereign" mean to you?

| | | | |
|---|---|---|---|
| a. | Exempt from taxation | 7% | n=30 |
| b. | Foreign | 5% | n=21 |
| c. | Self-governing | 71% | n=301 |
| d. | Don't know | 16% | n=69 |

- Nearly three-fourths of all respondents (71%) have an appropriate understanding of sovereignty.
- Interestingly, people who shop on reservations were less likely (66%) to know the meaning of the term.
- Awareness of the term increases with income (60% for under $30,000; 76% for $30-60,000; 80% for above $60,000. Awareness also increases with education (62% with less than a bachelor's degree; 87% with a degree) and with age (64% for under 30; 67% for 30-60; 87% for over 60).
- Other break-out groups with lower-than-average understanding of the term include ethnic minorities (55%).

Survey Item 16. What does the word "treaty" mean to you?

| | | | |
|---|---|---|---|
| a. | Legal contract with the force of law | 67% | n=286 |
| b. | Historic and/or ancient letter | 8% | n=33 |
| c. | Agreement that may be modified | 21% | n=91 |
| d. | Don't know | 3% | n=14 |

- The majority (67%) of respondents have a correct understanding of treaties.
- Caucasians (72%) are much more likely than ethnic minorities (56%) to correctly understand treaties.
- Similar to the previous item, correct understanding increases with education (62% with less than a bachelor's degree; 75% with a degree) and with age (64% under 30; 68% 30-60; 73% older than 60)

*The following 6 demographic items were included and used in analysis of the responses.*

Survey Item 17. In what age range to you fit in?

| | | | |
|---|---|---|---|
| a. | Below 30 | 46% | n=197 |
| b. | 30-45 | 27% | n=117 |
| c. | 46-60 | 23% | n=98 |
| d. | Above 60 | 3% | n=11 |

Survey Item 18. What is your educational background?

| | | | |
|---|---|---|---|
| a. | Some high school or diploma | 19% | n=80 |
| b. | Some college but no bachelor's degree | 42% | n=180 |
| c. | College bachelor's degree | 26% | n=111 |
| d. | More than a bachelor's degree | 12% | n=53 |

Survey Item 19. In which of the following ethnic/racial categories do you identify yourself?

| | | | |
|---|---|---|---|
| a. | African American | 17% | n=71 |
| b. | American Indian | 1% | n=6 |
| c. | European American/Caucasian | 70% | n=298 |
| d. | Hispanic | 4% | n=18 |
| e. | Mixed/Bi-racial | 4% | n=15 |
| f. | Other or no answer | 4% | n=16 |

Survey Item 20. What is your gender?

| | | | |
|---|---|---|---|
| a. | Male | 48% | n=24 |
| b. | Female | 52% | n=216 |

Survey Item 21. Which of the following best describes your political outlook?

| | | | |
|---|---|---|---|
| a. | Liberal | 43% | n=183 |
| b. | Moderate | 38% | n=163 |
| c. | Conservative | 18% | n=76 |

Survey Item 22. In what range is your household income?

| | | | |
|---|---|---|---|
| a. | Below $30,000 | 38% | n=156 |
| b. | $30,000-$60,000 | 33% | n=133 |
| c. | Above $60,000 | 29% | n=117 |

# Content Analysis

## *Methodology*

Research Question: What is the tone of newspaper articles in Upstate New York toward American Indians in general and specifically on the issue of taxation of products and services on Indian land.

Research Team: This research was conducted within an advanced class in Communication Research (COM 401) at Buffalo State College. Three professors, each with academic and professional experience in research, oversaw and coordinated the project. This particular project was administered as a joint project for the entire class.

Coding Sheet: A coding sheet was developed, pre-tested and revised. See Appendix C.

Population: The study identified a population of daily newspapers serving Upstate New York, where the issues of Indian taxation are of particular concern and currency. Specifically, five newspapers were identified to provide a representative overview of print media. The following newspapers were identified:

- Albany Times Union
- Buffalo News
- Rochester Democrat and Chronicle
- Syracuse Post-Standard
- Watertown Daily News

Sample: News stories and articles for analysis were taken from the "Start Page for Daily Internet Clips" provided by the client. Daily Web sites of newspapers were scanned for articles. Search key words of "Indians," "taxes" and "cigarettes" were used. Additionally, abstracts from the five newspapers were taken from a research service, NewsLibrary.com. Again, search key words of "Indians," "taxes" and "cigarettes" were used.

Timing: Since the analysis of full newspaper articles was a real-time study, the time frame was limited to March and April of 2005. The abstract study used a time frame of January 2004 through mid-April 2005.

Yield. The analysis of full newspaper articles yielded a total of 250 articles. The abstract study yielded an additional 80 article abstracts.

# *Findings and Observations of Content Analysis Project*

In general, each of the newspapers studied had a consistent range of articles on relevant issues. The variety of specific topics addressed within the articles included casinos and their proposed construction by non-New York tribes, the role of New York Gov. George Pataki, the sale of cigarettes and gasoline on reservations lands, tribal land claims, Indian sovereignty, and proposed legislation on taxing non-Indians on reservation lands.

Most of this reporting would reflect apparent objectivity and lack of obvious bias consistent with journalist standards. However, several findings specific to individual media emerged through the content analysis:

- Albany: The Times Union reported consensus about collecting taxes on sales to non-Indians, similar to most of the other newspapers studied. The common thread running through 20 articles studied is that the state would undoubtedly move forward with its proposal to tax sales to non-Indians.
- Buffalo: Most of the articles in The News about Indian taxation draw a correlation between New York State economy and the economy of Indian tribes. The explicit phrase or implicit indication that the state is "losing money" through non-collection of taxes was frequent in this newspaper.
- Rochester: The Democrat and Chronicle reported that area residents support taxation and that businesses in the area want quick results. Articles also focused on a grass-roots campaign by area convenience-store owners and gasoline distributors to encourage state lawmakers to stick with their plan to begin collecting taxes on goods sold on Indian reservations to non-Indians.
- Syracuse: The Post-Standard reported overwhelming public support for taxing non-Indians. Nine of 10 abstracts allude to the notion that Native Americans should pay property taxes and that New York State should collect sales taxes on Indian land. One article (19 Nov 2004) cites a state "loss" estimate that had risen in 24 months from $100 million to $609 million.
- Watertown: The Daily Times was the most supportive of Indian sovereignty and the most consistent with a pro-Indian point of view. Researchers found this newspaper alone to be "fairly neutral," with some articles positive toward Indians. The Mohawk Nation at St. Regis was mentioned in 11 of the 22 abstract articles studied.

In some articles, local citizens were quoted, often expressing anti-Indian sentiments. One newspaper quoted a citizen calling Indians "super-citizens" who unfairly do not pay taxes on land purchased off their reservations in New York State. Other articles expressed concerns about sale of tobacco to minors. State officials were frequently quoted or cited in most news reports; Indian news sources were significantly less evident in the newspaper reporting.

The abstract analysis provided researchers with the opportunity to observe the same story through the perception of different publications. In their conclusion on this part of the project, student researchers reported that their findings "consistently offset each other. Many abstracts are blatantly positive, but an overall negative tone exists for the majority of the abstracts."

The researchers also concluded that the content analysis of both articles and abstracts revealed no deep-seated animosity toward American Indians but rather a citizenry that was concerned about economic issues and energized by the thought of easy economic solutions.

### Relationship Between Coverage Focused on State Versus Indians Perspectives

The content analysis indicates that reporting on both land-claim issues and taxation generally is pro-state and anti-Indian. Evidence for this statement is based on the observation that assertions made by New York State officials about the state's presumed jurisdictional ability to collect taxes on sales on Indian lands commonly are presented without question or analysis. Conversely, contrary Indian assertions based on treaties and sovereignty claims seldom are offered at all as part of the coverage; if these assertions are reported, they generally are presented as being subject to state interpretation and/or subordinate to state claims.

### Relationship Among Various Topics in Coverage of Indian Issues

The content analysis yielded evidence of a bewildering juxtaposition of issues. Media audiences are confused by reporting that links issues such as Indian sovereignty and the relationship between New York State and Indian governments with tangential or at best overlapping issues. Examples of those latter issues are the controversies of casinos and the matter of profits generated by casinos. At the same time, newspaper coverage is weak or nonexistent on issues that many Indians would consider central, such as Indian sovereignty in general or treaty provisions in particular.

### Relevance of Newspaper Size to Coverage of Indian Issues

The coverage pattern of the Watertown newspaper – with a more observable pro-Indian reporting than other newspapers, or (depending upon point of view) less anti-Indian reporting than the others – provides an additional point for further investigation. The Watertown paper is the smallest of the newspapers studied, with an average daily circulation of 30,900 (the next largest newspaper is the Albany Times union with 99,000 circulation, followed by the Syracuse Post-Standard 122,000; Rochester Democrat and Chronicle, 169,000; and Buffalo News, 201,000). Some media researchers have observed that smaller newspapers tend to reflect local opinion to a greater degree than do larger and more metropolitan publications.

### Relevance of Newspaper Ownership to Coverage of Indian Issues

The Watertown newspaper, a family-run publication with a multi-generational history in the community, is the only locally-owned newspaper among any of those studied. General media research has looked at the relationship between local ownership and coverage of local issues and found, not surprisingly, that local ownership fosters greater editorial interest in the local community. Further studies might also look at the relationship of local ownership versus chain ownership with issues of particular interest to the local Indian community.

### Relevance of Proximity of Newspapers to Indian Land Entities

The content analysis indicated another pattern observed in the Watertown newspaper that deserves further study: that the closer geographically a newspaper is to Indian lands, the better its reporting is on Indian issues. "Better" is used here in the sense of coverage that is more consistent, more prolific, more thorough, less negative, and more balanced. Further investigation is warranted, particularly into whether such relationships exist merely because of geography or whether positive media environments are or can be supported by more than mere geophysical proximity.

## Relationship of Coverage to Indian Public Relations

Additionally, the Watertown newspaper is within the locality of the Akwesasne Mohawk Nation near St. Regis. This nation operates a professional and particularly effective communication department. Media researchers have documented the mutually beneficial relationship for both the media and organizations with a strong pro-active public relations program. The relationship between the Watertown newspaper and the Mohawk communication outreach deserves further study, particularly to discern not only a pattern of coverage of Indian issues but also to document, if it exists, any cause-effect relationship between Mohawk public relations and the perceived media results. Concurrently, further investigation in this area should document the communication efforts of other Indian tribal units throughout the state.

## Limitations and Additional Research

Research reports generally conclude with a good-faith disclosure of the limitation of the research. This content analysis has some such limitations that should be noted.

- One limitation was the nature of this research project as part of a college course. The research directors were three professors, each with a personal expertise in applied research. In addition to generating valid data, they also were attempting to provide a learning experience for students. These twin goals forged a research program that, while effective in yielding valid and reliable outcomes, was not particularly efficient.
- Time was another factor, particularly the ability to mesh the content analysis with the two related research projects being undertaken by the students.
- The third limitation was the difficulty in obtaining a suitable bank of media artifacts to be investigated.

Because of these inherent limitations, this content analysis was designed and conducted mainly as a preliminary investigation or pilot study into a topic that the researchers presumed from the beginning would require further investigation.

# Recommendations

The following recommendations grow out of two assertions by the researcher/author and of particular interest to the Communication Department's American Indian Policy and Media Initiative:

- Public policy generally results from perceived public opinion; and conversely, public opinion can impact public policy.
- Legislators and other makers of public policy sometimes presume public opinion and public support where it may not exist, with journalistic attention often underlying such presumptions.

Meanwhile, two issues of media scholarship also are useful introductions to the following recommendations. Both of these issues have particular relevance to the analysis of reporting and media attention to issues relevant to these studies, in particular the issues of taxation of non-Indians, the role of treaties, and the concept of Indian sovereignty.

- Media scholars use the phrase "agenda-setting theory of the media" to describe the notion that the media, while not necessarily telling their audiences *what to think*, tell them *what to think about*. This phenomenon is in play when newspapers and other media cover, or choose not to cover, certain issues important to the Indian community.
- Concurrently, media scholars use the term "framing" to describe the notion that the media, particularly news media, establish the parameters and ground rules for discussion of public issues. An example of this concept is the media coverage of proposals for state taxation that proceed from the state's assertion of a right to tax sales on Indian lands, an assertion that goes unchallenged by the media because they have framed the issue in such a way that the state is seen as the only legitimate interpreter of its own legislative claims.

A final observation by the author is that there is no evidence to suggest that and perceived journalistic shortcomings in media coverage of Indian issues are due to lack of goodwill or integrity. Rather, it should be remembered that journalists are busy professionals stretched in many different directions, sometimes lacking a depth of information, perhaps predisposed to frame stories in terms of controversy and opposing forces, and often disinclined to challenging basic assumptions of fact.

The following recommendations fall into two main categories: those that seek to impact public opinion directly, and those that seek to impact journalists who in turn influence public opinion indirectly through their writing and reporting. Undoubtedly, there may be overlaps between the two approaches.

## *Recommendations with Direct Impact on Public Opinion*

Recommendation 1. People who shop on reservations indicate a noticeably higher level of support for the Indian perspective on contemporary issues than people who do not shop on reservations. One misconception is that by buying from Indians on their lands, non-Indians are somehow taking advantage of Indians rather than supporting them. Thought should be given to developing a public education campaign directed toward potential non-Indians shoppers, educating them that their purchases are fair, legal and helpful to Indians and inviting them to shop with Indian businesses.

Recommendation 2. Despite their self-identified lack of education and information, most people seemed attuned to and supportive of what could be considered the pro-Indian side of issues, such as consensus that treaties should be honored and that state government should not unilaterally change tax policy. However, there clearly are some misunderstandings concerning the issue of taxation on Indian lands and the wider issue of the Indian rights and roles within the United States. Thought should be given to developing a public education campaign to address these and related issues.

Recommendation 3. The more people know about Indian issues, the more supportive they are of the Indian perspectives. Even though most people said they did not know much or enough about Indians and their culture, history and economic issues, the non-Indian public is open to learning more. Thought should be given to developing a public education campaign to address some of the contemporary issues facing Indians.

Recommendation 4. Despite a self-identified lack of information about Indian matters, most residents of Western New York – and there is no reason not to presume that this extends throughout the state – have an inherent predisposition to support what has been identified as pro-Indian concerns. Such support is widespread, coming from the majority of all ages and income levels, ethnicities, educational achievements, and political leanings.

## *Recommendations with Indirect Impact on Public Opinion*

Recommendation 5. Journalists often fall into the trap of identifying issues as being either liberal or conservative, often reflecting the partisan nature of public policy development. This research shows that support for Indian issues spans political leanings and claims a majority of people who identify themselves as political liberals, moderates and conservative. Thought should be given to developing a public education campaign that independently addresses each of these political ideologies. For example, one communication vehicle might address political conservatives, claim conservative values, and point to the consistency of issues such as Indian sovereignty, economic independence, and treaty continuity from arguments within the mainstream of conservative thought. Likewise, a parallel communication tool might address the liberal side of the issue, and another might grow from a moderate political philosophy. Similar outreach might be made to ethnic minorities through appropriate ethnic media, such as Black-oriented newspapers.

Recommendation 6. Journalists pride themselves in presenting fair and full coverage of the various sides of each issue and of exploring alternative approaches to public issues. Thought should be given to developing a mechanism for a consistent and authoritative presence of Indian voices in various non-Indian media outlets. While such a presence need not be aimed at presenting an artificially common Indian voice where none exists, it nevertheless could provide for various Indian spokespeople to enter more consciously into the public discourse. Concurrent with this recommendation is the training of spokespersons to effectively interact with reporters; media training could be made available individually or collectively to tribal leaders and spokespersons.

Recommendation 7. The key to an effective journalistic strategy lies in the media mix and the strategic engagement of various types of media: newspapers, television, radio and internet. Thought should be given to developing a comprehensive program of media relations with four significant components:

- Continue to communicate through the traditional print-media outlets: community, local and metropolitan newspapers. Be aware that the audience for such publications is aging, with the majority of newspaper readers middle-aged and older people, primarily Caucasians.
- Develop new and stronger initiatives in seeking media coverage through television, which attracts proportionally younger audiences than do newspapers.
- Develop new and stronger initiatives in seeking media coverage through radio. Be aware that ethnic minorities in particular often look to ethnic-focused radio.
- Develop an accessible and continuing presence through the internet, both to support journalists in reporting on Indian issues as well as to provide news and commentary directly to audiences.

Appendix A: Focus Group Discussion Guide

## Focus Group Questions

1. When you think of the term "Native American" or "American Indian" what images come to mind? (Stereotypes?) What is the source of your information?

2. Do any popular Native American figures come to mind?

3. What does the term *treaty* mean to you?

4. What rights do Indians have according to treaties? Should old treaty rights continue today?

5. Should the government be able to change treaty provisions?

6. Have you ever used an Indian reservation? How do you perceive their culture? Economic development?

7. How do you see Native Americans impacting American life?

8. How do you feel about the Native American communities being sovereign nations, with their own set of laws within the United States?

9. Have you made any purchases on the reservation within the last year? If so, how often? Why?

10. Do you support New York States proposal to tax purchases made by Non-Native Americans on reservations?

## Questionnaire

*This questionnaire deals with your opinions about American Indians in New York State, related tax issues, and your media use. It should take less than 5 minutes for you to complete. This survey is sponsored by students in Communication Research (COM 410) at Buffalo State College. Thank you for participating in this survey.*

(March/April 2005)

1. In what county do you live?
☐ a. Erie
☐ b. Niagara
☐ c. Monroe
☐ d. Other: _____

2. Where do you get most of your local and state news?
☐ a. Newspaper
☐ b. Television
☐ c. Radio
☐ d. Internet
☐ e. From other people
☐ f. Other: _____

3. How aware do you think you about local and state-wide current events?
☐ a. Very aware
☐ b. Aware
☐ c. Unaware
☐ d. Very unaware

4. How close to you live from an Indian reservation?
☐ a. Less than 10 miles
☐ b. Between 10 and 25 miles
☐ c. More than 25 miles
☐ d. Don't know

5. How often do you shop at an Indian reservation?
☐ a. At least once a week
☐ b. At least once a month (but less than once a week)
☐ c. Several times a year (but less than once a month)
☐ d. Never or almost never

6. *(Skip this question if you answered "never" in #5 above.)* If you do shop at a reservation, what is your main reason?
☐ a. To support American Indians
☐ b. Because it is close by and/or convenient
☐ c. To save money
☐ d. Other: _____

7. How many American Indians do you count as acquaintances, friends or family?
☐ a. None
☐ b. One
☐ c. 2-5
☐ d. More than 5

8. Which of the following statements is closer to your opinion?
☐ a. Treaties between the federal government and Indian tribes should be followed as they were written.
☐ b. Treaties between the federal government and Indian tribes should be updated.

9. *(Skip this question if you selected the first statement in #8 above.)* If you selected the second statement, at whose request should the treaties be renegotiated?
☐ a. Indian tribes
☐ b. New York State
☐ c. Federal government

10. By federal law and treaties, sales of products and services on Indian reservations are not subject to state tax. Which of the following statements is closer to your opinion?
☐ a. This policy should apply to <u>both</u> Indians and non-Indians.
☐ b. This policy should apply <u>only</u> to Indians.

11. If there were a sales tax on products purchased on Indian reservations, who should receive the tax revenues?
☐ a. New York State government
☐ b. the Indian tribal government

12. American Indians should continue to govern themselves, independent of the state.
☐ a. Strongly agree
☐ b. Agree
☐ c. Disagree
☐ d. Strongly disagree

13. Non-Indians should be able to benefit from tax-free items and services sold on Indian reservations.
☐ a. Strongly agree
☐ b. Agree
☐ c. Disagree
☐ d. Strongly disagree

14. How aware do you think you about American Indian society, culture and history?
☐ a. Very aware
☐ b. Aware
☐ c. Unaware
☐ d. Very unaware

15. What does the word "sovereign" mean to you?
☐ a. Exempt from taxation
☐ b. Foreign
☐ c. Self-governing
☐ d. Don't know

16. What does the word "treaty" mean to you?
☐ a. Legal contract with the force of law
☐ b. Historic and/or ancient letter
☐ c. Agreement that may be modified
☐ d. Don't know

17. In what age range do you fit in?
☐ a. Below 30
☐ b. 30-45
☐ c. 46-60
☐ d. Above 60

18. What is your educational background?
☐ a. Some high school or diploma
☐ b. Some college but no bachelor's degree
☐ c. College bachelor's degree
☐ d. More than a bachelor's degree

19. In which of the following ethnic/racial categories do you identify yourself?
☐ a. African American
☐ b. American Indian
☐ c. European American/Caucasian
☐ d. Hispanic
☐ e. Mixed/Bi-racial
☐ f. Other: _____

20. What is your gender?
☐ a. Male
☐ b. Female

21. Which of the following best describes your political outlook?
☐ a. Liberal
☐ b. Moderate
☐ c. Conservative

22. In what range is your household income?
☐ a. Below $30,000
☐ b. $30,000-$60,000
☐ c. Above $60,000

Appendix C: Content Analysis Coding Sheet

## Native American Project Content Analysis Coding Sheet

Name of Coder _____

Item date: _____ Paper _____ News _____ Editorial ____

Headline _____

Article summary _____

_____

_____

Key words or phrases: _____

_____

Tone toward Native Americans: _____ Positive _____ Neutral _____ Negative

Authority quoted: _____

Arguments raised: _____

_____

_____

Assertions made: _____

_____

_____

Coder's evaluation _____

_____

_____

(04/21/05)

# Exhibit B

STATE OF NEW YORK
COUNTY COURT COUNTY OF ST. LAWRENCE

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SETH A. SNYDER,

Defendant.

ANSWER AFFIRMATION
TO MOTION TO DISMISS
Indictment No. 2012-137
Index No. 21112

Jonathan Becker, under penalty of perjury pursuant to CPLR § 2106, hereby affirms as follows:

1. I am an attorney admitted to the practice of law in the courts of the State of New York and I am an Assistant District Attorney in St. Lawrence County, New York.

2. I make this affirmation upon personal knowledge and upon information and belief, the sources of which are a review of the file maintained by the St. Lawrence County District Attorney's Office, the pleadings and proceedings heretofore had herein, and New York and Federal statutes, regulations and case law.

3. The People deny in whole the allegations of fact and law in the defendant's Motion.

4. The Court should deny the defendant's motions.

## POINT I. DISCOVERY

### A. DTF RECORDS

5. With regards to the defendant's demand for the internal documents of the New York State Police Department of Taxation and Finance (hereinafter "the DTF"), those documents are not discoverable, and bear no relevance as to the defendant's culpability in this case.

6. The internal policy documents of the DTF, let alone of any New York State agency, are not demandable under CPL 240.20.

7. No explanation has been given why the defendant wants the records. Indeed, the defendant has not put forth the required showing of a good faith factual predicate of a reasonable likelihood that the records will actually be relevant and exculpatory "and that the quest for its contents is not merely a desperate grasping at a straw." *People v. Gissendanner*, 48 NY2d 543 (1979).

8. The People will not provide the documents.

9. The demand is facially insufficient, and the motion should be denied on this point.

### B. The Motion to Compel

10. This office provides open file discovery, as that term is understood by this Court. (Exhibit A, Interim Order from People v. Lalonde, Index. No. 20588).

11. The defendant was provided a DVD-ROM at arraignment, pursuant to the open file discovery policy of this office.

12. On the DVD-ROM was a complete copy of the People's file, and included the photos of the Penske truck and its contents, evidence receipts, and a copy of the police narrative.

13. A copy of the DVD-ROM was also provided to the co-defendant, and a copy was provided to the Court.

14. Absent a specific request of what the defendant believes is missing from the DVD-ROM, the People continue to operate in the good faith belief that all discoverable evidence has already been provided.

15. To the degree the defendant buried additional demands for DTF records in that section of his motion, (See Paragraph 9. g. of defendant's motion), said records are still beyond his reach absent the particularized showing required by the Court of Appeals.

16. Ironically, it appears the documents he demands are attached to his motion as exhibits. Since he already has them, we do not need to provide them again.

17. As all discoverable documents have already been provided, the motion should be denied on this ground as well.

## POINT II & III. SANDOVAL AND MOLINEUX DEMANDS

18. The People are not required to provide notice of our intent to use *Molineux* evidence against the defendant in the case in chief before trial. *People v. Small*, 12 NY3d 732 (2009). The People are only required to provide notice, just before jury selection, of *Molineux* we intend to use for impeachment. CPL 240.43.

19. The defendant's motion claims a right under CPL 240.43 which does not exist. On that ground, the motion should be denied.

20. To the extent the defendant's demand can be construed as an inartfully drafted CPL 240.43 demand, the People will provide the notice in the manner required by the statute.

21. The People have no objection to the Court scheduling a *Sandoval* hearing but the defendant misstates its purpose. A *Sandoval* hearing is an opportunity for a defendant to contest what information can be used by the prosecutor for impeachment. *People v. Betts*, 70 NY2d 289 (1987), *People v. Carter*, 50 AD3d 1318 (3d Dept 2008). It is not a *Molineux* hearing.

22. So long as the hearing will be conducted pursuant to the Court of Appeals definition, the People have no objection to a hearing just before trial.

## POINT IV. A BILL OF PARTICULARS WILL NOT BE PROVIDED

23. First, the defendant's request for a Bill of Particulars is late. CPL 200.95(3). Though the People consented to a one week extension of the 45 day deadline for the omnibus motion; we did not also waive our rights to the timeliness of other demands or other notices.

24. Second, the defendant was provided open file discovery. This office declines to provide a bill of particulars, both because the information is beyond the scope of the

statute, and because the defendant does not need the bill of particulars to prepare his defense. CPL 200.95(4).

25. Most, if not all, of the information the defendant seeks in his request was already provided as part of open file discovery. To the extent it was not, the request is untimely.

26. Moreover, this branch of the motion is procedurally improper, as the defendant cannot move to compel a bill of particulars he never timely requested in the first place. CPL 200.95(5).

27. The motion should be denied on this ground.

## POINT V. INSPECTION OF THE GRAND JURY MINUTES AND ARGUMENTS REGARDING DEFENSES NOT PRESENTED TO THE GRAND JURY

28. The People have no opposition to the Court conducting a second review of the Grand Jury minutes to ascertain the legal sufficiency of the presentment.

29. In the Court's first review, the co-defendant did not move for dismissal for legal sufficiency. However, the Court did dismiss Count One as multiplicitous, but otherwise denied the co-defendant's motion. (Exh. B, May 31, 2012 Order). The Court sent a letter subsequently that Count Two is now constructively amended to be read as the co-defendants acting in concert with one another.

### A. THE EVIDENCE WAS LEGALLY SUFFICIENT

30. The evidence in this case was legally sufficient to prove the crime.

31. The elements of Tax Law § 1814(c)(2) are that the defendant:

a. Was not an agent licensed by the commissioner

b. Willfully possessed or transported for the purpose of sale

c. Thirty thousand or more unstamped cigarettes

32. Here, the evidence showed:

a. The defendant was not a licensed agent, as shown by a certificate of non-entry. (Grand Jury Exhibit 2).

b. The defendant's willful possession and transportation for purpose of sale was shown by his admission that he purchased a total of 92 cases of cigarettes for his use as a cigarette distributor on another reservation. (Grand Jury Exhibit 6).

c. Investigator Taylor testified he inspected the cigarettes, and found at least 30,000 unstamped cigarettes. (Grand Jury Minutes 22-23).

33. The possession or transportation of 5,000 or more unstamped cigarettes is presumptive evidence the cigarettes are possessed for purpose of sale and are subject to Tax Law § 471.

34. All cigarettes within the State are presumed subject to the tax until the defendant proves to the contrary. Tax Law § 471(1).

**B. THE PEOPLE WERE NOT OBLIGATED TO PRESENT DEFENSES**

35. The defendant asserts that certain "possibly exculpatory" evidence should have been presented to the Grand Jury. (quoting defendant's motion, paragraph 17).

36. The People are under no obligation to provide possibly exculpatory evidence to the Grand Jury. *People v. Lancaster*, 69 NY2d 20 (1986). There is also no requirement to provide the defendant's potentially exculpatory statements to the Grand Jury. *People v. Mitchell*, 82 NY2d 509 (1993).

**a. Richard Ernst's email**

37. First, he argues that an e-mail sent by Richard Ernst, Deputy Commissioner of the Department of Taxation and Finance, should have been submitted to the Grand Jury as potentially exculpatory evidence. The defendant mischaracterizes the meaning of that e-mail. (Exhibit C, April 27, 2012 Affirmation by Steve Krantz, Paragraphs 10-14).

38. The e-mail is also inadmissible hearsay.

39. And, the email does not provide a defense to a crime.

40. A defendant cannot rely on an internal communication of the Department of Taxation and Finance, without more, as a defense to a crime. CF CPL 15.20(2)(defense requires official statement or interpretation).

41. Second, the defendant has not cited any case law for the proposition that an internal communication, not intended for public consumption, somehow becomes an official statement. *Cf People v. Marrero*, 69 NY2d 382 (1987). Moreover, a statement by an agency that an act is beyond its jurisdiction does not make the act legal. *People v. Saltzman*, 126 Misc2d 686, 690-91 (Crim Ct, New York County 1984).

42. Third, the email does not in any way state that Native Americans are not in violation of the law if found off their reservations with unstamped cigarettes. It simply

says that the Department of Taxation and Finance will not necessarily seize those cigarettes as contraband. This does not mean that other law enforcement agencies cannot seize the cigarettes, or that the possessors and transporters of those cigarettes is lawful.

43. Finally, the email itself is not exculpatory. And the People were not required to present any statements the defendant may have given to the police regarding the email that he believes were exculpatory. *See People v. Mitchell*, 82 NY2d 509.

44. It was not error to not present this evidence.

**b. Information Related to the Inter-Reservation Shipment of Cigarettes**

45. Second, the defendant argues that the People should have introduced evidence that the defendant's employer is owned by Native Americans, and that this was a shipment between reservations.

46. We did. The information was submitted, but contrary to the defendant's assertion, the information is inculpatory.

47. Grand Jury Exhibits 5 and 6, the codefendants' Mirandized statements, were both submitted as exhibits. The contents of each statement was read into the record. Between the two statements it is clear the defendants went from one reservation to another, picked up the unstamped cigarettes, and were headed back to the first reservation.

48. As the Grand Jury was properly charged, "Pursuant to Tax Law § 471(1), there is a tax on all cigarettes possessed in the state by any person for sale. The tax is imposed on all cigarettes sold on an Indian reservation to non-members of that Indian nation or tribe, and to non-Indians." (Minutes, 27:6-11).

49. Moreover, Grand Jury Exhibit 4, a properly admitted certificate of non-entry showed that Seneca Haw Tobacco Project Wholesale is not licensed by the Department of Taxation and Finance. The company is not authorized by New York State act as a wholesaler of cigarettes. Tax Law 481-a.

50. Here, the defendants were not members of the tribe selling the cigarettes. Thus, the information that is was being transported to another reservation is inculpatory, and it was properly presented to the Grand Jury.

**c. The Letter Sent by the Two New York State Senators**

51. The defendant argues that a letter, which the People did not have until the defendant attached it to his motion, is not only not exculpatory, it is irrelevant.

52. First, the defendants were not initially charged by felony complaint. However, in the interim between the seizure of the cigarettes and the presentment to the Grand Jury, no one contacted this office on behalf of the defendants or sent this office the materials the defendant claims should have been presented.

53. To the extent two State Senators disagree with the current state of New York Law, they can exercise their roles as legislators to seek repeal of the statute. They do not however have the power to overrule the discretion of a prosecutor to charge or interpret the law.

54. Had this evidence been submitted, it would have only served to confuse the jury. As such, it would have been improper to submit it.

55. As the proposed evidence is not even exculpatory, let alone relevant, it was not error to not submit the letter.

**d. The language of Tax Law § 471**

56. The defendant insists that the Grand Jury should have been instructed that Tax Law § 471(1) states that the tax cannot be imposed on "sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation."

57. As noted above, Tax Law § 471(1) was quoted as part of the People's instruction, as it was relevant to this presentment.

58. There is no evidence at all that either defendant is a member of the St. Regis Mohawk Tribe. Indeed, there is no evidence whatsoever to indicate either defendant is a member of that tribe. And the defendant in his motion does not assert that he is a member of the St. Regis Mohawk Tribe. Ironically, there is no evidence the defendants are actually Native American.

59. It was not error to exclude the proposed language from the jury charge.

## POINT VI. DISCLOSURE OF THE GRAND JURY MINUTES

60. Normally, as part of the stipulation in lieu of motions process, the People would consent to the defendant's review of the Grand Jury minutes.

61. Here, the defendant asks for disclosure under CPL 210.30(3). However, that disclosure is permitted only if the Court finds release is necessary to assist the Court in making a determination on the motion.

62. The People oppose disclosure, as the defendant has had ample opportunity to move this court as to the propriety of the presentment. If the Court finds otherwise, the People insist that disclosure happen in the customary fashion employed for the stipulation in lieu of motions.

63. The People do not consent to copying of the minutes and request that if disclosure is done, it be in the Court's chambers, with the People present.

64. Since the defendant did not make this request during the 45 days when the omnibus motion was due, the People request that the Court also limit the defendant to any further arguments to the Court's grounds for necessity for release of the minutes.

**A. WITH REGARDS TO THOSE ARGUMENTS RAISED TO THE THE JURY'S CHARGE**

65. To the extent the defendant argues the grand jury was not properly charged or constituted, the motion is without merit.

66. With regards to the challenge to the sufficiency of the instructions provided to the Grand Jury, in paragraph 21 of the defendant's motion, there is no pattern instruction for Tax Law § 1814.

67. The jury was charged with the language of the statute that related to the elements of the crime. The jury was also charged with the presumptions stated in Tax Law § 1814(d) and Tax Law § 471(1). The definition for willfully was taken from Tax Law § 1801(c).

68. The other definitions for the terms listed in Tax Law § 1814 were taken from Tax Law § 470.

69. The Grand Jury was instructed on accomplice liability as defined under Penal Law § 20.00. The tax rate for cigarettes was sourced from Tax Law § 471(1). The Grand Jury was also charged that the admissions needed to be corroborated, pursuant to CPL 60.50, and as to the admissibility of a defendant's statements.

70. In light of the foregoing, there was no error in the instructions to the Grand Jury.

71. Contrary to the assertion of the defendant in paragraph 29 of his motion, there is no "shifted burden" in Tax Law § 1814(d). A presumption does not shift the burden of proof, it simply relieves the prosecutor of having to prove that element. *In re Raquel M.*, 99 NY2d 92 (2002).

72. Contrary to the assertion of the defendant in paragraph 29 of his motion, New York law does not differentiate "what types of cigarettes are 'subject to tax'. All cigarettes in the State are presumed taxable. Tax Law § 471(1).

73. To the extent the defendant challenges whether all the jurors who voted heard all the evidence in the presentment, the case was presented in a single session, and all the grand jurors who voted heard all the evidence and charges.

74. The motion should be denied on this ground.

## POINT VII. THERE IS NO JUSTIFICATION FOR SUPPRESSION OF THE PHYSICAL EVIDENCE

75. The defendant's motion for suppression is facially insufficient.

76. First, the defendant claims in paragraph 31 of his motion that upon information and belief, Border Patrol checkpoints in New York State are a "subterfuge" by the New York State Police.

77. The defendant is required by CPL 210.45(1) and 710.60(1) to "state the sources of such information and the grounds of such belief." *See People v. Jennings*, 69 NY2d 103, 113 (1986) (purpose of statute is to protect People from unfair surprise), *People v. Mezon*, 80 NY2d 155 (1992).

78. The defendant cites to "media reports" but does not cite the actual reports. This is an improper violation of CPL 710.60(1).

79. The defendant further claims one of his attorneys has witnessed the operation of a checkpoint in a specific way. Who? When? Where? That attorney's observations are also not relevant as there is no claim the checkpoint in this case was conducted in the alleged way. The People are being subjected to improper conduct by the defendant. *People v. Mezon*, 80 NY2d 155.

80. On this ground, the motion should be summarily denied.

81. Second, the defendant does not assert a cognizable ground for suppression. CPL 710.60(3)(a).

82. "Hearings are not automatic or generally available for the asking by boilerplate allegations." *People v. Mendoza*, 82 NY2d 415 (1993). Specifically, hearings are "not available merely for the asking." *People v. Gruden*, 42 NY2d 214.

83. The defendant has not in any way alleged that the evidence was unlawfully or improper acquired by the police. CPL 710.20(a).

84. The defendant was lawfully stopped at a stationary border patrol checkpoint, where he was asked routine questions by a border patrol officer. (Arraignment Discovery at 7).[1] The New York State Police were not involved in any way in the initial stop.

85. The defendant does not allege that the checkpoint was being conducted improperly or unlawfully. He simply hopes the stop was unlawful. That is not sufficient for a motion to suppress.

86. Since the defendant's motion just asks for a hearing, it is improper. See People v. *People v. Mendoza*, 82 NY2d 415.

87. The motion should be denied on this ground.

88. Third, it is well established that stationary border checkpoints are constitutional. *People v. Sinzheimer*, 15 AD3d 732 (3d Dept 2005), *People v. White*, 8 Misc3d 935.

89. To the extent the defendant claims the checkpoint was a pretext, pretext stops are constitutionally permissible under both Federal and New York law. *People v. Robinson*, 97 NY2d 341 (2001), *Whren v. US*, 517 US 806 (1996).

90. Since the defendant's motion is based on claims of facts which have no basis, and there is no claim of improper conduct by the police in anyway, his bare hope that there was improper conduct by the police is insufficient to warrant a hearing.

91. The motion should be denied as well.

[1] Discovery was provided on DVD-ROM to the Court at arraignment. References to "Arraignment Discovery" are to a PDF of the same name in the Discovery folder on the DVD-ROM. Page numbers refer to the page of the PDF itself, and not to any specific document contained within the PDF.

## POINT VIII. A TRIAL DEFENSE IS NOT A LEGITIMATE BASIS FOR DISMISSAL

92. The defendant's motion to dismiss on the basis of his defense of mistake of law is legally impossible.

93. A defendant can only seek dismissal of an indictment using one of the exhaustively enumerated methods. CPL § 210.20.

94. Defenses are issues for trial, and are not bases for dismissal. *People v. Hudson,* 217 AD2d 53 (2d Dept 1995).

95. The defendant does not even cite CPL 210.20 or any other statute in Article 210 as support for his motion.

96. As such, the motion should be denied as failing to state a legitimate basis for relief. Moreover, it should be denied for failing to put the People on reasonable notice of his arguments, as required by CPL 210.45.

97. To the extent the Court will consider the motion for dismissal, the defendant claims he gave documents to the police, and claimed he was relying on those documents. However, the defendant's statement to the police omitted any reference to that claim. (Grand Jury Exhibit 6).

98. To the extent the defendant has put us on notice of this statement, the People hereby provide notice under CPL 710.30 of our intention to use the statement against the defendant at trial.

99. As argued in Point V, supra, the defendant provides no case law for the proposition that an internal email, not intended for public consumption, can somehow be construed as an official statement within the meaning of Penal Law § 15.20(2).

100. And neither the New York State Police nor this office are bound by assessments of the law by the Department of Taxation and Finance. The ultimate arbiter of the interpretation of the State's laws is the Court of Appeals.

101. The defendant's arguments to the contrary are improper.

102. The motion should be denied on this ground.

## POINT IX. THE STATUTORY PRESUMPTION OF TAX LAW § 1814(d) IS CONSTITUTIONAL

### A. THE ARUGMENT IS FRIVOLOUS

103. As a starting point, the defendant's motion is frivolous.

104. The defendant explicitly admitted he sells cigarettes and purchased 92 cases for that purpose. (Grand Jury Exhibit 6).

105. And, at no point does the defendant aver or even claim that he is a member of the St. Regis Mohawk Tribe. The statute explicitly deems his original purchase from the St. Regis Mohawk Tribe as taxable. Tax Law § 471(1). Thus, when he was transporting unstamped cigarettes, he was in direct violation of the plain language of the statute.

106. This portion of the motion is frivolous and needlessly confuses the issues before the Court. The motion should be denied on this ground.

B. THE STATUTORY PRESUMPTION IS PERMISSIVE AND CONSTITUTIONAL

107. There are two kinds of statutory presumptions, permissive and mandatory. *County Court of Ulster County NY v. Allen*, 442 US 140, 157 (1979).

108. A mandatory presumption shifts the burden of proof to the defendant. *Id.* at 159.

109. The defendant's argument that the Tax Law § 1814(d) presumption is mandatory does not cite and defies decades of New York case law.

110. In New York, all statutory presumptions are permissive. *In re Raquel M.*, 99 NY2d 92, 95 (2002), *People v. Stickler*, 97 AD3d 854 (3d Dept 2012).

111. A permissive presumption allows, but does not require, the fact finder to accept the presumed fact as true. *In re Raquel M.*, 99 NY2d at 95.

112. The burden of proof does not shift to the defendant; the presumption is rebuttable by any other evidence in the case, including the People's. *Id.* at 95. At no point is the defendant required to testify to rebut the presumption. *People v. Moro*, 23 NY2d 496.

113. A permissive presumption is unconstitutional as applied only when there is no rational way the fact finder could make the connection between the predicate facts and the presumed inference. *Id.* at 95-96.

114. The analysis is whether it is more likely than not that the presumed fact flows from the predicate facts proven by the prosecutor. *Id.* at 96.

115. Though not required, relevant to the analysis is whether the element is separately and amply proven by other evidence. *Ulster County v. Allen*, 442 US at 160.

116. The rational relationship test is employed when measuring the constitutionality of a permissive presumption. *See People v. Leyva*, 38 NY2d 160, 168 (1975).

117. The rational relationship test asks whether the prescription of the statute is "rationally related to a legitimate State purpose." *People v. Parker*, 41 NY2d 21 (1976). "The Legislature's actual purpose need not be apparent." *People v. Walker*, 81 NY2d 661, 668 (1993).

118. Part of the legislative intent for Tax Law § 1814 was to address the "serious threat" unregulated cigarette sales pose "to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state." Tax Law § 1814, Laws 2000, ch 262, § 1, eff Nov 14, 2000. The legislature also found that "existing penalties for cigarette bootlegging were inadequate". *Id.*

119. Here, the permissive presumption is that someone in possession of 5,000 or more cigarettes is presumed to possess those cigarettes with intent to sell and they are subject to the tax. It is well established that when someone possesses an enormous amount of cigarettes, it is not for personal use.

120. Here, the defendant not only admitted he is a cigarette wholesaler, (Grand Jury Exhibit 6), he argues that he is in his omnibus motion. (Defendant's Motion at 10). There is no question the cigarettes were being transported for purposes of sale.

121. In addition, in this case, the number of cigarettes is 920,000. Even had the jury disregarded the presumption, there is no other logical conclusion other than that a wholesaler with 920,000 cigarettes intends to sell them.

122. The clear language of the statute is that sales by one tribe to another are taxable. Tax Law § 471(1). That is not a presumption. And the defendant never argues that he is a member of the Saint Regis Mohawk Tribe.

123. Moreover, it is well established by Federal and United States Supreme Court holdings that the State can tax sales of cigarettes sold by one tribe to another. *Oneida Nation of New York v. Cuomo*, 645 F3d 154 (2nd Cir. 2011), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980).

124. The statutory presumption is constitutional as applied to the facts of this case. The motion should be denied on this ground.

## POINT X. THE INTERESTS OF JUSTICE MILITATE AGAINST DISMISSAL

125. The defendant's burden in a motion to dismiss in the furtherance of justice requires the existence of "the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." CPL § 210.40(1). *People v. Rickert,* 58 NY2d 122 (1983). The Court must consider the enumerated factors under CPL § 210.40(2), both individually and collectively.

126. Dismissals in the interests of justice "must be 'exercised sparingly.'" *People v. Quadrozzi,* 55 A.D.3d 93, 103 (2d Dept 2008) *citing People v. Martinez,* 304 A.D.2d 675 (2d Dept 2003). It is best practice to hold a hearing on motions to dismiss in the interests of justice. *People v. Quadrozzi,* 55 A.D.3d at 104, *citing People v. Clayton,* 41 A.D.2d 204, 207 (2d Dept 1973)(other citations omitted).

A. THE SERIOUSNESS AND CIRCUMSTANCES OF THE CRIME

127. The defendant is charged with the Class D Felony of Possession or Transportation of Unstamped Cigarettes, Tax Law § 1814(c)(2). The evidence presented to the Grand Jury is that the two co-defendants were found smuggling 92 cases of unstamped cigarettes.

128. By his own admission in his motion, the defendant admits that he was transporting the cigarettes for the purpose of sale. (Defendant's Motion at 27).

129. The 92 cases of unstamped cigarettes represent approximately $273,792 in unpaid excise and sales taxes. There are approximately 10,000 cigarettes in a case of cigarettes.

130. The defendant had 890,000 more cigarettes than he needed to commit the felony. This was not a minor or technical violation of the law. This was egregious.

131. Here, the violation was also blatant. The defendant had with him a bill of lading that showed he personally paid $90,816 for the cigarettes. (Arraignment Discovery at 14).

132. The seriousness of this crime is also based on the theft of needed revenue to the State. It is well documented that the State, indeed the Country, is mired in a prolonged financial recession.

133. It is also well documented that tax evasion in other countries has played a significant role in exacerbating the international financial crisis. See James Surowecki, *Dodger Mania,* The New Yorker, July 11, 2011. Liz Alderman, *Greece Warns of Going Broke as Tax Proceeds Dry Up,* New York Times, June 5, 2012.

134. In his motion, the defendant restates his arguments from other parts of his motion, and claims simply that the law does not apply to him. The plain language of the

statute is clear, and the defendant's claimed defense of mistake of law is simply an issue for trial.

135. As the defendant is unapologetic as to his violation of the law, and the circumstances of the case make obvious that this is a serious case, the motion should be denied on this ground.

**B. EXTENT OF THE HARM CAUSED BY THE OFFENSE**

136. Here, the defendant was found with a million unstamped cigarettes, worth nearly a quarter of a million dollars in unpaid taxes.

137. The defendant argues the crime is not violent, the defendant does not believe he committed a crime, and that the cigarettes are not taxable.

138. That the cigarettes are taxable is incontrovertible. The import of the Federal Appeals case is that the Native American tribes across New York are unlikely to prevail on their efforts to have the law they charge non-Native Americans sales tax invalidated. *Oneida Nation of New York v. Cuomo*, 645 F.3d at 175-76.

139. That the crime is non-violent is of no consequence. The State has a legitimate interest in the enforcement of its laws, and that cannot be negated simply because some laws punish for non-violent conduct.

140. Also, by evading the taxes, the defendant steals profits from those who abide by the law. The defendant's crime feeds into a larger tax evasion enterprise, that totals approximately $110 million annually. The Second Circuit Court made a thorough examination of the facts of the harm of the tax evasion. *Oneida Nation of New York v. Cuomo*, 645 F.3d at 158-160.

141. The businesses which operate legitimately are forced to compete in the marketplace with criminals. Those businesses sought relief under Article 78 during the Department of Taxation and Finance's policy of forbearance and prior to the 2009 amendment of the Tax Law. *See New York Ass'n of Convenience Stores v. Urbach*, 92 NY2d 204 (1998).

142. The defendant's evasion of the cigarette tax also is money he has stolen from the treatment of those with illnesses caused by smoking. Public Health Law § 1399-nn et seq.

143. There are too many victims in this case. The defendant's claim there are no victims defies common sense.

144. The motion to dismiss should be denied on this ground.

C. EVIDENCE OF GUILT

145. There is no controversy that there is overwhelming evidence of guilt. As the defendant notes in his motion, he freely admits that he was in possession of the cigarettes for the purpose of sale. His motion affirms that.

146. His arguments to the contrary defy controlling case law, are without merit. Since the defendant simply repeats his arguments from other parts of his motion, the People refer to our responses from the other points in our response.

147. To the extent he challenges the strength of the People's case, the defendant's motion cannot be granted on that ground. *See People v. Dunlap*, 216 AD2d 215, 217 (1st Dept 1995).

148. To the extent the defendant claims the permissive presumption under Tax Law § 1814(d) will be rejected by the jury, that is simply idle speculation.

149. As there is overwhelming evidence of guilt, the motion to dismiss should be denied on this ground.

**D. HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT:**

150. The defendant claims he has no criminal history. This is false. He has no prior convictions in New York State. He was convicted of a misdemeanor in Florida.

151. The defendant has a criminal history in Florida:

a. On November 17, 2004, the defendant was charged in Palm Beach County with participating in an unlawful race in the second degree, possession of not more than 20 grams of marijuana in the first degree, and use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia.

b. On May 2, 2005, the defendant pled to driving while license suspended in the first degree and the marijuana possession charge. He was sentenced to concurrent terms of 6 months probation and $218 in court costs for each charge.

152. The defendant's criminal history in New York includes:

a. On May 20, 2005, the defendant was charged with driving while intoxicated (hereinafter "DWI") in Sheridan, New York. He was placed on interim probation on October 20, 2005. On November 16, 2006, the

defendant pled to driving while ability impaired by alcohol (hereinafter "DWAI") in satisfaction, and paid a fine.

b. On March 18, 2010, the defendant was charged with DWI and refusal to take breath test in the Evans, New York. The defendant pled to DWAI on November 15, 2010, and was fined $750. His license was also revoked.

c. On February 25, 2012, the defendant was charged with aggravated unlicensed operation in the second degree, false personation, driving without a license and speeding in Brant, New York. The case is still pending.

153. Moreover, a lack of criminal history is not a viable ground for dismissal in the interests of justice. *People v. Varela*, 106 AD2d 339 (1st Dept 1984).

154. Also, the defendant's claim that he was transporting the cigarettes on behalf of his employer is at best half true. His name specifically is on the bill of lading as the purchaser of the cigarettes. (Arraignment Discovery at 14). His employer is not listed on the Invoice.

155. The defendant fails to state a compelling fact on this factor, and the motion should be denied on this ground.

**E. ANY EXCEPTIONALLY SERIOUS MISCONDUCT OF LAW ENFORCEMENT PERSONNEL IN THE INVESTIGATION, ARREST AND PROSECUTION OF THE DEFENDANT**

156. The defendant makes no argument on this point.

## F. THE PURPOSE AND EFFECT OF IMPOSING UPON THE DEFENDANT A SENTENCE AUTHORIZED FOR THE OFFENSE.

157. The defendant argues there is no legitimate purpose in sentencing this defendant, because his conduct was somehow legal at some point prior.

158. It was not. The point of the authorized sentence for this defendant is to cement in him that his conduct was criminal, and he should conform himself to the law.

159. That this defendant has had multiple experiences with the criminal justice system already, especially related to DWI, it would appear the defendant is desperate need of supervision.

160. Here, there is a range of punishments available for this defendant, and since this was an economic crime, the purpose and effect of imposing sentence on him would be to deter him, and those like him, from continuing in this criminal enterprise.

161. The defendant has failed to cite a compelling fact for this factor.

162. The motion should be denied on this ground.

## G. THE IMPACT OF A DISMISSAL UPON THE CONFIDENCE OF THE PUBLIC IN THE CRIMINAL JUSTICE SYSTEM

163. The defendant argues that the impact of dismissal will somehow affirm the public's faith in the criminal justice system. This is simply untrue.

164. If the People of the State of New York did not want cigarette smuggling to be a crime, or for cigarettes to be taxed at such a high rate, they would have elected officials to repeal the 2009 amendments to the Tax Law.

165. Instead, a dismissal would only serve to create a belief by those who obey the law that they do not need to do so. The statute says do not do this thing and the defendant did precisely that.

166. The defendant has failed to establish compelling facts on this ground.

167. The motion should be denied on this ground.

## H. THE IMPACT OF A DISMISSAL ON THE SAFETY OR WELFARE OF THE COMMUNITY:

168. In this case, the defendant transported cigarettes en masse in a truck. If this case were dismissed, the defendant and other smugglers would be inured into turning St. Lawrence County into an even more active corridor for contraband. Moreover, dismissal of a case where the amount of contraband is so significant will clog the courts, where all defendants charged with this crime will seek the same lenity. Finally, the State will lose the ability to enforce its tax law even on currently legitimate businesses, because there will be no threat of penalty.

169. The defendant's conclusory statement does not establish a compelling fact, as is his burden. The motion should be denied on this ground.

## I. THE ATTITUDE OF THE COMPLAINANT OR VICTIM WITH RESPECT TO THE MOTION:

170. The victim in this case is the fisc of the State of New York.

171. The Department of Taxation and Finance has already made it explicitly clear it wants this law enforced. **(Exhibit 3).**

172. The victims of this case are the People of the State of New York, and as explored above, the harm to the People is lost tax revenue.

173. The defendant also cites a study from 2005, which precedes the 2009 amendment of the Tax Law, and does not ask at all opinions whether those surveyed approve of tax evasion by Native Americans.

174. The study is irrelevant to this case.

175. The motion should be denied on this ground.

**K. ANY OTHER RELEVANT FACT INDICATING THAT A JUDGMENT OF CONVICTION WOULD SERVE NO USEFUL PURPOSE**

176. The blanket assertions by the defendant throughout this section of his motion, without citation to the sources of his information, are improper. CPL 210.45.

177. He simply reiterates again and again that somehow the issue is whether the tax law is enforceable off the reservation at all. The argument is frivolous and well settled. The tax law is enforceable for off reservation activity. *See Oneida Nation of New York v. Cuomo*, 645 F3d 154 (2d Cir 2011), *Cayuga Indian Nation of New York v. Gould*, 14 NY3d 614 (2010), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980), *New York State Dept of Taxation and Finance v. Tyler Distribution Centers*, 225 AD2d 936 (3d Dept 1996).

178. The defendant here freely admits his criminal conduct, but will not plead guilty. This is not grounds for dismissal.

## POINT XI. THE DEFENDANT'S "ADDITIONAL MOTIONS"

179. With respect to paragraph 106 of the defendant's motion, the People object to the defendant filing any other motions that are time barred pursuant to CPL 255.20.

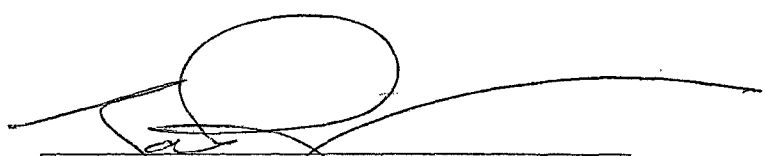
180. With respect to paragraph 108 of the defendant's motion, the People object to the defendant's lack of notice with regards to "other and such relief" which is not specified as required by CPL 210.45(1) and 710.60(1).

## CONCLUSION

181. The defendant's core argument is that he committed the crime but in defiance of the plain language of the statue and stare decisis, his case should be dismissed.

182. A dismissal would be a manifest injustice.

WHEREFORE, the People respectfully request that the Court enter an Order denying the relief requested in the defendant's moving papers in its entirety and for such other and further relief as the Court deems just and proper.



Jonathan Becker
Assistant District Attorney

Dated this 8th day of August, 2012, at Canton, New York.

c. Dennis Vacco, Esq.
Attorney for defendant

# Exhibit 1

STATE OF NEW YORK
COUNTY COURT: ST. LAWRENCE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

TIMOTHY J. LALONDE,
Defendant.

AMENDED
DECISION AND ORDER

Indictment # 2011-193
Index # 20588

Appearances: The People, by Nicole M. Duvé, Esq., District Attorney
Defendant Timothy J. LaLonde, by Mary E. Rain, Esq., Public Defender

On August 3, 2011, the above referenced defendant was arraigned with counsel on Indictment # 2011-193 charging him with Driving While Ability Impaired by Drugs [E felony Vehicle and Traffic Law § 1192-4] and Aggravated Driving While Intoxicated [E felony Vehicle and Traffic Law § 1192 (2-a)(b)].

At arraignment the People turned over a complete copy of their file to the defense in lieu of discovery. The defense filed a Demand for Discovery and a Demand for Bill of Particulars.

The People did provide a bill of particulars, on the return date of the motion to compel, but did not answer the discovery demand. A Discovery/Motion conference is scheduled for August 29, 2011, at 1:00 p.m. to allow defense counsel to review the grand jury transcript of the presentment in this matter.

In the meantime, defense counsel filed a motion dated August 10, 2011, and returnable August 15, 2011, seeking to have the Court compel the prosecution to answer the defendant's Demand to Produce and Demand for a Bill of Particulars. The People did not answer the motion to compel.

Oral argument was had on the motion on August 15, 2011. The defendant was represented by Mary Rain, St. Lawrence County Public Defender. The People appeared by Nicole Duvé, St. Lawrence County District Attorney.

Defense counsel stated on the record that the motion to compel was specific to receiving an answer to the Demand to Produce. At this time the court declines to compel the People to

answer the defendant's Demand to Produce. The current system in use, consisting of open file discovery being provided by the prosecutor, and defense review of the grand jury transcript of the presentment, is set up to obviate the need for filing of a Demand to Produce and a Demand for a Bill of Particulars.

The question has to be asked and answered, "What does open file discovery mean?" It is not complicated. The prosecutor is ethically bound to provide to defense counsel a complete copy of the People's file. This means everything in the People's file, including those items that may not be provided by police agencies unless specifically requested and that are covered under the umbrella of CPL § 240.20, items that the People are required to turn over, even if not specifically demanded by defense counsel. In return for the defense not filing a Demand to Produce, and in return for the People not having to answer a Demand to Produce, everything must be turned over.

Violations of open discovery will thus most likely not come to a head until trial when the particular item that has not been turned over is attempted to be used at trial. The relief granted will be dependent on the importance of the item at trial, why it wasn't turned over, and what prejudice results to the defendant. Many times there is no reason why an item has not been turned over and it turns out to be prejudicial to the defense but dismissal or preclusion is not the answer. It is a determination dependent on a variety of factors. However, the prosecution has to know that sanctions are a possibility or there would be no incentive to comply with open discovery.

In order for the process to work, all sides have to be invested in its utility. If one side makes a habit of not turning everything over, or the other side continues to file demands and motions not required, the process will become toothless and reversion back to what is set forth in the CPL will result.

The same applies to Demands for Bills of Particulars. There is very limited information that a defendant is entitled to by way of such a Demand. The value of reading the grand jury transcript, as permitted in the pre-trial disclosure conference, is obvious. Upon review of a grand jury transcript defense counsel should have the answers to any demands that might be put forth in a Demand for Bill of Particulars. If for some reason the information is not in the grand jury

transcript, resolution of the issue should be able to be addressed by letter requests to the Court, copy to the People.

At this time defense counsel's motion to compel is denied. The parties are presumed to be aware of their responsibilities in this process as well as the likelihood of consequences should they fail to comply and not live up to their responsibilities. So ordered.

Enter.

Dated: August 24, 2011

Jerome J. Richards

JEROME J. RICHARDS
Judge of County Court

JEROME J. RICHARDS
County Court Judge

STATE OF NEW YORK
COUNTY OF ST. LAWRENCE
COUNTY COURT CHAMBERS
48 COURT STREET
CANTON, NY 13617

315-379-2214
FAX: 315-379-9934

STEPHEN J. EASTER
Principal Law Clerk

DONNA M. REED
Secretary to Judge

August 24, 2011

Mary E. Rain, Esq.
Public Defender
St. Lawrence County
48 Court Street
Canton, NY 13617

Re: The People of the State of New York v. Timothy J. LaLonde
*Indictment* # 2011-193, Index # 20588

Dear Ms. Rain:

Enclosed please find a copy of an **Amended Order** regarding the above-entitled matter.

The original **Amended Order** has been forwarded to the St. Lawrence County Clerk's Office for filing.

Sincerely,

Jerome J. Richards
County Court Judge

cc: Hon. Nicole M. Duvé, District Attorney
Mary B. Curran, Chief Clerk

# Exhibit 2

STATE OF NEW YORK
COUNTY COURT: ST. LAWRENCE COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ORDER
Indictment # 2012-137
Index # 21112

**ANDREW W. MUNCH** and
SETH A. SNYDER,

Defendants

---

Appearances: The People, by Nicole M. Duvé, Esq., District Attorney
Jonathan Becker, Esq., of counsel
Defendant Andrew W. Munch, by Silver & Collins,
John Collins, Esq., of counsel
Defendant Seth A. Snyder, by Lippes, Mathias, Wexler, Friedman, LLP,
Richard M. Scherer, Jr., Esq., of counsel

JEROME J. RICHARDS, J.

Pursuant to a written stipulation entered at a pre-trial disclosure conference with defense counsel the court has reviewed the grand jury minutes in order to resolve the issues raised on behalf of defendant Munch. The court previously entered an order authorizing defense counsel for defendant Munch, on consent of the district attorney, to examine but not to copy the grand jury minutes as part of the disclosure conference. Defense counsel for Mr. Snyder has elected not to participate in the pre-trial disclosure conference procedure and instead to use traditional omnibus motion practice as provided in the CPL.

Defendants are charged with acting in concert with each other in the alleged possession and transportation of unstamped cigarettes [Tax Law §1814(c)(2)] on March 2, 2012 in the Town of Waddington. The acts are charged in count 1 against Snyder, acting in concert with co-defendant Munch. Count 2 charges Munch with acting in concert with Snyder. The counts both charge the same acts, in a single transaction. The counts are confusingly charged in the indictment, since the clear intent of the prosecution was to charge each defendant with participating in a single criminal transaction. Count 1 is dismissed as multiplicitous with respect

to defendant Munch. Since counsel for defendant Snyder has not participated in the pretrial disclosure conference procedure, and has filed no omnibus motion as of this date, the court makes no finding or ruling with respect to Mr. Snyder.

Defense counsel for Mr. Munch does not challenge the legal sufficiency of the grand jury evidence, but argues that the legal instruction on page 31, line 13 was confusing and defective. The court disagrees. On the whole, the charge accurately reflects the statutory definition of the crime. Portions of the instruction were repeated in response to juror questions. This did not render the instructions or the proceeding defective. The motion to dismiss the indictment is therefore denied. So ordered.

Enter.

Date: May 31, 2012

Jerome J. Richards

JEROME J. RICHARDS, J.C.C.

# Exhibit 3

STATE OF NEW YORK: COUNTY OF ST. LAWRENCE
COUNTY COURT

| | |
|---|---|
| THE PEOPLE OF THE STATE OF NEW YORK<br><br>- against -<br><br>ALEXANDER E. BENEDICT and<br>ANDREW L. LAUGHING,<br><br>Defendants | TAX DEPARTMENT<br>AFFIRMATION AND<br>ARGUMENT IN<br>OPPOSITION TO MOTION<br>FOR SUBPOENAS<br><br>Indictment #2011-187B<br>Index No.: 20573 |

STATE OF NEW YORK )
} ss.:
COUNTY OF ALBANY )

Steve Krantz, an attorney duly admitted to the bar of the State of New York, states and affirms under penalties of perjury pursuant to CPLR §2016:

1. I am an employee of the New York State Department of Taxation and Finance (DTF), where one of my roles is to serve as counsel to the office of tax enforcement. Prior to working for DTF, I worked at various State and local agencies with responsibility for investigations and enforcement. I am familiar with legal aspects of criminal enforcement in New York, and have become familiar with the parts of this case concerning subpoenas to government agencies.

2. I make this affirmation in opposition to the application by defendant Laughing for a subpoena duces tecum to be issued to DTF Deputy Commissioner Richard Ernst.

3. The factual allegations herein are made on information and belief. The sources of my information and the bases of my belief include my personal familiarity with DTF criminal enforcement, conversations with DTF staff and review of relevant documents including court papers filed in this case.

## PROCEDURAL BACKGROUND

4. Defendant Laughing was arrested by the New York State Police on about June 27, 2011, and indicted a few days later.

5. On September 30, 2011, defendant Laughing moved for dismissal of the indictment in the interest of justice pursuant to Criminal Procedure Law (CPL) §210.20(1)(i) & 210.40(1) (the Clayton motion), supported by an attorney affirmation (the Pease Affirmation). On October 26, 2011, the Court heard oral argument on that motion.

6. By order dated November 30, 2011, the Court stated:

> The motion to dismiss an indictment in furtherance of justice is governed by CPL 210.40. Not only is the court required to recite the basis for its decision, but the reasons must be supported by facts in the record. Since the motion is based in large part on assertions of fact about the nature of state law enforcement policy, there must be a hearing in order to provide a basis for the court's eventual decision. Among the issues which it would seem important to clarify are whether the defendants are in fact Native American, and if so, what is their tribal affiliation and status; where were the cigarettes acquired by defendants, and for what purpose; where did the defendants tell law enforcement officers they were going with the cigarettes and for what purpose; and what is the present policy of the New York Department of Taxation and Finance and of the New York State Police with respect to prosecution of unstamped cigarette charges involving alleged Native Americans. The court will therefore schedule a *Clayton* hearing to allow the parties to develop relevant facts.

Order at 2 (citations omitted).

7. On March 2, 2012, defendant Laughing made the first of two motions for issuance of a subpoena duces tecum to DTF Deputy Commissioner Richard Ernst and NY State Police Superintendent Joseph D'Amico. The Court denied the motion, without prejudice to renew, based on a procedural flaw in the motion. The Court added: "In order to facilitate all parties' preparation to answer any new motion and to prepare

the *Clayton* hearing, that hearing is now scheduled to occur on May 14, 2012 at 1:30 p.m." Order at 3-4.

8. On April 13, 2012, defendant Laughing moved a second time for issuance of a subpoena duces tecum to Deputy Commissioner Ernst and Superintendent D'Amico (the second subpoena motion).

9. Assistant District Attorney Jonathan Becker opposed the second subpoena motion by letter dated April 16, 2012. The New York State police opposed the second subpoena motion by an Affirmation of John Harford, and a memorandum of law, dated April 25, 2012.

**THE JULY 6 EMAIL**

10. The Clayton motion relies in substantial part on an email sent by Deputy Commissioner Ernst to DTF investigator supervisors, dated July 6, 2011, on the subject "Cigarette Enforcement" (the July 6 email). A copy of the July 6 email is attached to the Clayton motion papers.

11. The Clayton motion papers seem to suggest that the July 6 email embodies legal determinations about the scope of criminal tax laws intended as guidance for law enforcement agencies across the State. Such characterizations are untrue and misleading.

12. The true nature of the July 6 email is evident from its face. It was a direction to DTF investigators only, about how, for the time being, to proceed in particular kinds of cases described by that email.

13. More precisely, it was intended that while the July 6 email remained in effect, DTF investigators confronting the kinds of situations described therein should and would confer with their supervisors so that decisions about how to handle those situations would be made on a case-by-case basis under all the known circumstances. However, in any situation in which the DTF investigator could not timely reach an

appropriate supervisor, or for any other reason it would not be possible to make a determination whether to seize property based on all the known circumstances of that situation, then the DTF investigators were to follow the guidelines set forth in the July 6 email.

14. The policy reflected in the July 6 email, as explained in paragraph 13 above, was in effect prior to the arrest in this case on June 27, 2011, and the July 6 email thus served to memorialize a policy already in place. Since the time that policy was adopted, it has never been revoked. It remains in effect today, though it is subject to change by DTF at any time.[1]

**ARGUMENT**

15. DTF recognizes that the Court, in its order of November 30, already contemplated that a Clayton hearing would address the present policy of DTF and the State Police with respect to prosecution of unstamped cigarette charges involving alleged Native Americans. Now that the second subpoena motion has been made and briefed, we respectfully ask the Court to consider the arguments herein, and other arguments on that motion, in deciding whether it is appropriate to grant the motion and require further evidence, beyond the July 6 email, about internal agency matters like enforcement guidelines.

16. DTF joins in the arguments of the District Attorney's Office and the State Police, and incorporates herein the papers filed by those offices in opposition to the second subpoena motion.

---

[1] Indeed, the email itself, referring to the situation of "Non native Americans transporting untaxed native American cigarettes from a reservation outside of NYS to a reservation inside NYS," states: "Don't seize at this time. This may be the first type of Native American cigarettes that we seize."

17. Defendant Laughing is charged with cheating the State out of about *a quarter million dollars* of tax revenue. Clayton relief is not available unless the defendant demonstrates that

> dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.

CPL §210.40(1). Defendant's papers do not show any inequity whatsoever, much less any compelling facts clearly demonstrating such injustice as to require dismissal.

18. The conduct charged in this case was not the defendant's first foray into smuggling of untaxed cigarettes. As his own motion papers admit, he was engaged in similar conduct when he was stopped by the police earlier in June 2011. On that occasion, the police did not arrest him. The fact that he got a break should have made him grateful and shown him the error of his ways. Instead – remarkably – he now argues that the break he got on that occasion entitled him to continue his criminal conduct with impunity.

19. The core of defendant's Clayton argument is that dismissal of criminal charges can be justified when enforcement of a given law within the State is inconsistent from place to place, time to time, or agency to agency. Yet defendant is unable to cite a single authority for that proposition. I submit that such inconsistencies in enforcement are in fact a ubiquitous reality of the criminal justice system, as people with experience in that system can readily attest. The fact that enforcement policies and practices often vary greatly by time, place and agency – and yet defendant can cite no precedent suggesting that such variation can warrant Clayton relief – is telling.

20. A second theme of defendant's Clayton argument is the suggestion that the law should not be interpreted to cover the conduct of transporting native brand cigarettes in this case. See Pease Reply Affirmation ¶8 ("The defendant's argument is that the product that he was transporting, native brand cigarettes, enjoy elements of protection

under the acknowledged sovereign rights of Indian tribes that are not properly addressed by the existing tax law"). If the defendant wishes to argue that the relevant statutes do not cover the charged conduct – or that they may not do so consistently with "the acknowledged sovereign rights of Indian tribes" – then his remedy is not a Clayton motion, but rather a motion to dismiss the indictment based on insufficient evidence before, or incorrect legal instructions to, the Grand Jury.

21. DTF respectfully submits that defendant's motion papers distort the facts and distort the law to provide a basis for seeking internal agency materials and a basis for Clayton relief. Mistakes of fact and law are prominent in those papers, and defendant's arguments depend crucially on those mistakes. When even one of those mistakes is exposed, it should be clear that there is no basis for the access to administrative materials that defendant seeks. We turn to a demonstration of some of the most serious mistakes on which defendant's argument relies.

## I. The evidence sought is irrelevant to the proper analysis of a Clayton motion.

### A. New York law enforcement is not a monolith directed by the Tax Department.

22. Defendant seems to think that it is DTF that determines the scope of criminal tax laws.[2] The truth, of course, is that the courts, and not executive agencies, are the final interpreters of the law.

23. It is true that executive branch agencies have a role in formulating and implementing enforcement policies. But that function is divided among many State and

[2] See Defendant's Reply Aff. ¶6 ("The State is basically acknowledging that it may ultimately make the determination that Native Brand cigarettes do not fall within the proscriptions of the Tax Law and that therefore, transporting untaxed Native Brand cigarettes is not a criminal act"); id. ¶9 (if DTF "had determined that Native Brand cigarettes do not fall within the proscription of the Tax Law," it would be "exculpatory").

local agencies. Defendant seems to think that DTF may direct those other agencies in these matters.[3] The truth, of course, is that State and local agencies formulate their own understanding of the criminal law and set their own policies.

B. The July 6 email could not and did not set policy for law enforcement generally.

24. The July 6 email does not reflect any legal determinations as to what conduct is illegal, what persons may be arrested, or what property may be seized. Nor does it seek to direct the conduct of personnel in any agency other than DTF. See ¶¶ 11-13 supra. Even if it did, such a determination would be beside the point in a criminal case like this one, in which it is the Court that makes the determinations about what conduct is criminal under the statutes.

25. The July 6 email is relevant only to internal agency guidelines in a complex and evolving area of law enforcement. If such guidelines were relevant to the issues before the Court, then defendant could rely on the July 6 email itself to make the necessary points. But internal agency guidelines should not even be considered relevant.

C. Internal agency enforcement guidelines provide no basis for Clayton relief.

26. When a court is considering a Clayton motion, CPL §210.40(1) requires it to consider, to the extent appropriate, ten listed factors. Not one of those ten appears to be implicated by claims of inconsistencies in enforcement from place to place, time to time, or agency to agency.

27. Perhaps the closest of the statutory factors is the one that addresses "misconduct" of law enforcement personnel, though only when the misconduct is "exceptionally serious." There is no misconduct whatsoever, much less serious

[3] See Defendant's Reply Aff. ¶9 (if DTF "had communicated with the State Police indicating that it was the position of [DTF] that Native Brand cigarettes do not fall within the enforcement provisions of the Tax Law," it would be "exculpatory").

misconduct, in the circumstance that different law enforcement agencies may operate under different enforcement guidelines at any given time. Even the defendant acknowledges that "[t]here is no allegation of any exceptionally serious misconduct of the law enforcement personnel in this case." Pease Affirmation ¶5(e).

28. The motion papers then go on to criticize the "thoroughness" of the State Police investigation. Id. Of course, the alleged lack of thoroughness is far from the kind of misconduct that could count in favor of Clayton relief. Moreover, the allegation is baseless. It is premised on the idea that had the State Police contacted DTF, they would have been advised that DTF took the position that the arrest and seizure should not take place. Again there are two reasons that this is completely wrong. First, it is not the role of DTF to tell the State Police which defendants to arrest and what property to seize, even in a case involving the Tax Law. Second, it has never been the position of DTF that these defendants should not have been arrested or that this property should not have been seized.

29. Since the listed Clayton factors contain nothing suggesting a need for uniform law enforcement priorities across the State, there is no surprise in defendant's inability to cite any case law support for relief under the circumstances he alleges.

## II. Defendant's Clayton analysis distorts the seriousness of defendant's criminal conduct and the positions taken by DTF.

### A. The defendant's culpable conduct is repeated, extensive and serious.

30. Defendant admits that a few weeks prior to the arrest in this case, he was involved in transporting a similar load of untaxed cigarettes. On that occasion, he was stopped, but – even though he "may have initially tried to deceive the Investigator as to the product in the truck" – he was not arrested. Pease Affirmation ¶5(c). Defendant tries to use this prior misconduct in his favor.

31. First, on the factor of "evidence of guilt," defendant suggests that he was "entitled to rely" on the non-arrest in the prior incident "to come to the conclusion that it was not unlawful" to transport untaxed cigarettes. Pease Affirmation ¶5(c). This assertion is not only absurd but also incoherent as a legal matter. Supposing for a second that defendant somehow believed, at the time of the second incident, that tax evasion were legal, such ignorance of the law would not count against guilt.

32. Second, on the factor of his "history, character and condition," defendant really tries to have it both ways. He takes advantage of the break he got in the prior incident, when he could have been arrested on felony charges, by arguing that he is a 25 year old single man "with no criminal history." Pease Affirmation ¶5(d).

33. The reality is that on this occasion – and it was not the first – the defendant was engaged in the extremely serious crime of transporting about a million untaxed cigarettes representing about $248,000 of damage to the State in the form of lost tax revenue. People's Answer to Clayton Motion ¶¶ 9-10.

B. Evasion of cigarette taxes is rampant and presents a major problem for the State.

34. Defendant's motion papers are full of suggestions that the charged conduct is not a very big problem,[4] and that DTF does not take it seriously.[5] Nothing could be further from the truth.

---

[4] Pease Affirmation ¶5(b) (aside from potential harm to the State Treasury, "the transportation of untaxed cigarettes poses no risk of harm to any individual person or group. There is generally no violence associated with this type of activity..."); id. ¶5(h) ("There is absolutely no indication that a dismissal of the count would have any impact on the safety or welfare of the community").

[5] Pease Affirmation ¶5(a) (as to factor of offense "seriousness," claiming that DTF has taken position that native brand cigarettes should not be seized by law enforcement in New York); ¶5(i) (the victim in this case would be [DTF], the State Agency responsible for protecting the Treasury," and DTF "has indicated their position on this matter").

35. Cigarette tax evasion "costs us hundreds of millions in lost tax revenues each year." Testimony of DTF Deputy Commissioner William Comiskey before the Senate Standing Committee on Investigations and Government Operations (Oct. 27, 2009).

36. The State's recognition of the seriousness of this problem is illustrated by a number of enforcement initiatives as described in a news release attached to the People's affirmation in opposition to the Clayton motion. "Cuomo Administration Announces New Cigarette Tax Enforcement Efforts" (July 15, 2011).

37. "'It has been our consistent position that cigarettes should be taxed under the law and the courts have repeatedly agreed,' Governor Cuomo said. 'The law is the law and we will enforce it. Everyone must pay their fair share, and that includes those who sell cigarettes.'" Id.

C. DTF and the State have a clear legal position on native brand cigarettes.

38. Defendant's papers on the Clayton motion cite the July 6 email to conclude that at least for the time being, DTF "has taken the position that Native American cigarettes should not be seized by law enforcement officials in the State of New York." Pease Affirmation ¶5(a). This is false in three important ways.

39. First, the July 6 email, far from purporting to apply to law officials across the State, applied to DTF investigators only. See ¶¶ 12-13 supra. Second, even in its application to DTF, the July 6 email does not reflect any legal determinations. It is a set of internal guidelines for enforcement conduct when individualized decision-making is unfeasible. Id. Third, the actual DTF legal position is precisely the opposite of the one that defendant claims is reflected in the July 6 email.

40. I am submitting herewith a brief recently filed by the Attorney General on behalf of the State Police in a case in this county.[6] It reflects the State's clear and unequivocal position as to native brand cigarettes:

> [T]here is no merit to amici's contention that the fact that the cigarettes were manufactured on the Mohawk reservation limits the State's authority to seize the cigarettes outside the reservation. .... The shipment of unstamped cigarettes at issue here is subject to the same tax laws and regulations as any other shipment of unstamped cigarettes in New York State.

Memorandum of Law at 7 (cross-reference omitted).

41. The position of DTF is equally clear: Presently, pursuant to the New York State law, all cigarettes that are possessed within the state are presumed to be subject to tax. In addition, except for a few limited circumstances which are listed in federal and state laws, and in state rules and regulations, only New York State licensed agents are allowed to possess unstamped cigarettes.

42. Defendant's concluding argument for Clayton relief is this: "Until such time as the State of New York makes a determination as to the taxability of Native brand cigarettes, a Judgment of Conviction in this case serves no useful purpose." Pease Affirmation ¶5(j). As the above paragraphs make clear, that time has arrived. The executive branch has made a determination. If defendant wants to test that determination, he may do so in this Court, but his avenue would not be this Clayton motion. It would be a legal challenge to the applicability of the statute.

43. Perhaps the gravest distortion appears in ¶5(i) of the Pease Affirmation. The affirmation's quotation of the statutory standard is correct: the Court, where it deems it appropriate, is to consider "the attitude of the complainant or victim with respect to the

---

[6] State Police Respondents' Memorandum of Law in Response to Amicus Submission, In re HCI Distribution, Inc. (Index No. 138276) (Sup. Ct. St. Lawrence Co. Apr. 25, 2012).

motion." CPL §210.40(1)(i). The affirmation also correctly points out the DTF is a victim of the charged crimes. But it then goes on not to cite the attitude of DTF *with respect to the motion* – the statutory factor – but rather to argue that the attitude of DTF *with respect to the charged conduct* was that the defendant "should not have been arrested and the load should not have been seized." As already seen, that is false, because DTF did not and does not take any such position. More fundamentally yet, that is not even the statutory standard. When the correct standard is applied, it counts strongly against Clayton relief, because DTF, as a victim in this case and for reasons stated above, is unequivocally opposed to the motion for dismissal on Clayton grounds.

**WHEREFORE**, I respectfully request that the Court deny the motion of defendant Laughing for issuance of a subpoena duces tecum directed to Deputy Commissioner Richard Ernst of the Department of Taxation and Finance.

Dated: April 27, 2012
Albany, New York

Steve Krantz
Counsel, Office of Tax Enforcement
Department of Taxation and Finance

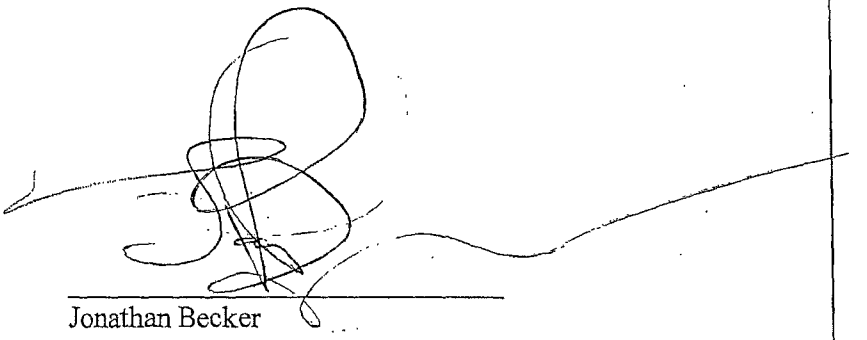
OFFICE OF THE DISTRICT ATTORNEY – ST. LAWRENCE COUNTY

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )
) ss:
COUNTY OF ST. LAWRENCE )

I, JONATHAN BECKER, am an attorney admitted to the practice of law in the courts of the State of New York and an Assistant District Attorney in St. Lawrence County, New York, and under penalty of perjury pursuant to CPLR § 2106, hereby affirms that: I am not a party to the action; I am over 18 years of age; and on the 9th day of August, 2012, I served one copy of the APPELLANT'S BRIEF in regards Index No. 21112, the PEOPLE OF THE STATE OF NEW YORK vs. SETH SNYDER, by depositing same in a properly addressed wrapper in the St. Lawrence County mail service facility, Canton, New York, addressed to the following with copies required to:

Dennis Vacco
Lippes Mathias Wexler Friedman LLP
665 Main Street
Suite 300
Buffalo, New York 14203-1425



Jonathan Becker
Assistant District Attorney

# Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SAINT LAWRENCE

---

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

SETH A. SNYDER,

Defendant.

**AFFIRMATION OF DENNIS C. VACCO**

Indictment No. 2012-137
Index No. 21112

---

STATE OF NEW YORK )
COUNTY OF ERIE ) ss.:

**DENNIS C. VACCO**, an attorney duly admitted to practice law before the courts of this State, hereby affirms the following to be true subject to the penalties of perjury:

1. I am a Partner with LIPPES MATHIAS WEXLER FRIEDMAN LLP, attorneys for the Defendant Seth A. Snyder (the "Defendant"), and make this reply affirmation in further support of the relief specified in the Notice of Motion, and in reply to the People's opposing papers.

2. The relief sought includes production of materials and dismissal of the charges set forth in the indictment. The People have failed to adequately respond to Defendant's motion and have reached far beyond proper actions and arguments in a desperate attempt to have the indictment hold up to scrutiny. As a result, all requested relief should be granted.

## POINT I
## DISCOVERY DEMANDS AND BRADY MATERIALS

3. With respect to the discovery demands, the People merely state in conclusory fashion that the requested items are not discoverable and cite general case law in support, without any specificity regarding individual demands.

4. The People have ignored the individual requests of the Defendant and instead have resorted to blanket conclusions that the materials generally are not discoverable.

5. For example, the prosecution generally states that the internal documents of the New York State Department of Tax and Finance (the "DTF") are not demandable under N.Y.C.P.L. § 240.20 and are not properly discoverable as *Brady* material.

6. At the outset, any claim by the People that the Defendant has not explained why he wants these records is outrageous. To the contrary it well established law that the People have an obligation to deliver to a defendant material which is favorable to the defendant. *See People v Hayes*, 17 N.Y.3d 46, 50 (2011) ("a criminal defendant's right to due process is violated when the prosecution suppresses favorable evidence."); *see also People v. Williams*, 7 N.Y.3d 15, 19 (2006); *People v. Bryce*, 88 N.Y.2d 124, 128 (1996). The reason a defendant is entitled to such information is two-fold: (a) it is possessed by the prosecution and (b) is favorable to the defendant. No other explanation or justification is needed from the Defendant. Our system of justice is irreparably distorted if the People are allowed to avoid this important duty. The very basis of the Defendant's motion is his belief that Native-American manufactured cigarettes which are transferred from reservation to reservation are not subject to taxation by the State of New York. The People's position that documents created by the very State

agency responsible for the collection of taxes and enforcement of tax laws and policies relating to enforcement of the very laws at issue in this case are somehow irrelevant is illogical. The notion that these documents which set forth **policy** regarding Native American cigarettes are irrelevant to the prosecution of this case is equally illogical and without merit.

7. N.Y.C.P.L. § 240.20 sets forth the items that the People *shall* provide upon defendants' demand. Importantly, pursuant to the CPL when the prosecution refuses to produce the requested evidence, the court "must order discovery . . . if it finds that the prosecutor's refusal to disclose such material is not justified." N.Y.C.P.L. § 240.40(1)(a). Here the prosecution has failed to articulate any sort of justification as to why the specific requests of defendant should be denied. Instead, the People simply claim that the material requested is either already provided or somehow outside the scope of discovery.

8. Additionally, contrary to the People's unsupported and generic claims that *Brady* material need be exculpatory, *Brady* material is simply evidence which is "favorable" to the accused and "material either to guilt or punishment, or affecting the credibility of prosecution witnesses." *People v. Baxley*, 84 N.Y.2d 208, 213 (1994); *see also United States v. Bagley*, 473 U.S. 667, 675 (U.S. 1985).

9. Here, the People simply claim that the Defendant is not entitled to the internal documents because they are not *Brady* materials.

10. In other words, the People rely on their narrow view of *Brady* materials to avoid disclosure of the requested items, by claiming they don't have any materials that fit into that category. They do not, however, claim that they do not possess what is requested. Thus, under the proper reading of *Brady*, the People are required to turn over

the requested items or confirm that they do not possess them, which has not occurred because of their narrow interpretation.

11. Here the Defendant has requested documents related to the DTF's policy on collection of taxation on cigarettes produced and sold by Native Americans. While the People simply state that in requesting this evidence the Defendant is "grasping at a straw", it cannot be controverted that documents setting forth statutory interpretations that the Defendant's conduct is not to be prosecuted, is evi*dence tha*t would clearly be exculpatory. The material sought clearly would demonstrate that the Defendant did not have the requisite *mens rea* to be have violated the crime charged in the Indictment.

12. It is additionally worth noting that it appears that this Court has already ruled in *People v. Laughing*, a similar case involving nearly identical charges, that the Ernst Memorandum and the testimony of Mr. Ernst is directly on point to the issues of taxation. Accordingly, it appears that this Court has already ruled that the Ernst Memorandum and more broadly documents related to the DTF's policy on collection of taxation are *Brady* material and must be turned over. Nevertheless, the Assistant District Attorney has submitted the disingenuous affidavit of Steve Krantz, an employee of the DTF, to support an argument that was already rejected by this Court. Accordingly, the People knew at the time they submitted their opposition papers that the DTF documents requested are *Brady* material and must be produced.

13. Moreover, it is important to note that *Brady* material includes material "affecting the credibility of prosecution witnesses", making the Defendant's requests squarely *Brady* material. *Baxley*, 84 N.Y.2d at 213. The People have claimed the DTF has made clear that it wants Tax Law §1814(c)(2) enforced in the present situation. *See*

Affirmation of Jonathan Becker, at ¶171. Mr. Becker has gone so far as to submit an affidavit of Mr. Krantz, an employee of the DTF and now a witness in this matter, to support this claim. The statements of Mr. Becker and Mr. Krantz, however, are in direct contrast to the very policy articulated in the documents which the People seek to hide from the Defendant. Because these statements are contradicted by the memorandum of Deputy Commissioner Richard Ernst, the Defendant is entitled to explore these contradictions so as to question the credibility of Mr. Krantz and other witnesses.

14. The *Brady* demands here cannot be summarily dismissed by the prosecution. Responses or confirmation of the evidence's non-existence must be provided to the Defendant. The People's lack of specificity and general denials demonstrates either a lack of consideration of the individual demands, or an attempt to improperly conceal from the Defendant exculpatory and necessary documentation or materials.

## POINT II
## DEMAND FOR A BILL OF PARTICULARS

15. The People first argue that the Defendant's request for a Bill of Particulars is untimely on the grounds that it consented to an extension of the omnibus motion only. *See* Affirmation of Jonathan Becker, at ¶23. This position is not supported by the facts. Your deponent's colleague, Richard M. Scherer, Jr., specifically requested and was granted an extension of time to file any motions in this matter. This agreement was memorialized in Mr. Scherer's July 3, 2012 letter to the Court, which states "We are writing to confirm that Assistant District Attorney Jonathan Becker has agreed to our request for an extension to file any motions in the above-referenced matter." A copy of this correspondence is attached hereto as **Exhibit A**. This agreement was subsequently approved by your Honor on July 7, 2012. *See id.* Mr. Becker did not once object to this

agreement or inform your deponent that he was of a different opinion as to what the agreement on an extension was. Accordingly, any claim that the Defendant's demand for a Bill or Particulars or any other aspect of the Defendant's motion is untimely must be rejected.

16. The People additionally take the position that because it has provided some discovery up to this point, there is no need for it to provide a Bill of Particulars. Once again, the People make conclusory arguments rather than address any of the Defendant's actual requests.

17. Finally, citing N.Y.C.P.L. § 200.95(4), the People take the position that the Defendant does not need a Bill of Particulars to prepare for his defense. This conclusory claim, however, completely contradicts of the requirements of the N.Y.C.P.L. § 200.95(4), which provides that the People's refusal to provide a Bill of Particulars "**shall set forth the grounds of such belief** as fully as possible, consistent with the reason for the refusal." *Id.* (emphasis added). Here, the People have made no attempt to explain the refusal.

18. The Defendant's demands seek notice of allegations to which he is entitled. The items provided are completely insufficient. Importantly, the very definition of a "bill of particulars" supports defendant's requests here. In pertinent part, a "bill of particulars" is defined as:

> a written statement by the prosecutor specifying, as required by this section, ***items of factual information which are not recited in the indictment and which pertain to the offense charged and including the substance of each defendant's conduct encompassed by the charge*** which the people intend to prove at trial on their direct case . . . .

N.Y.C.P.L. § 200.95(1)(a) (emphasis added).

19. A bill of particulars "is designed to insure that the defendant is supplied with sufficient information to properly prepare his defense." *People v. Fitzgerald*, 45 N.Y.2d 574 (1978).

20. Here, however, the People have not explained why it will not supply information and have instead taken the rote position that the Defendant's demand for a Bill of Particulars is untimely. To the extent that this Court determines that the Defendant's request is untimely, the Defendant respectfully requests that the Court excuse the un-timeliness as a simple misunderstanding between the District Attorney's office and your deponent's office. Here, the People have not asserted that they would in anyway be prejudiced by what they contend is an untimely demand for a Bill of Particulars. Accordingly, the People have failed to justify why the requested information should not be provided, and the People should be directed to provide the necessary facts to the Defendant so that a defense can adequately be prepared.

## POINT III
## INSPECTION OF GRAND JURY MINUTES SHOULD BE PERMITTED

21. The People argue that the grand jury minutes should only be provided to the Judge in camera for a determination as to their sufficiency, rather than providing them to the Defendant.

22. This suggestion does not adequately take into account the uniqueness of the situation and the complicated nature of New York's Tax Law.

23. As set forth in the Defendant's initial moving papers, there is a substantial amount of evidence that the Defendant believes was not presented to the Grand Jury. Moreover, as explained below, it appears from the People's own admissions that much of

what was provided was legally and factually insufficient to support an indictment. As result of the substantial amount of evidence improperly withheld from the Grand Jury, the Defendant requests the opportunity to review the Grand Jury minutes. It is respectfully submitted that the Defendant's ability to review the minutes will provide substantial assistance to the Court while promoting judicial economy by not placing the burden of a detailed review of the Grand Jury minutes on the Court alone. *See Dennis v. United States*, 384 U.S. 855 (1966).

### *A. The People's Description of New York Tax Law § 1814(c)(2) to the Grand Jury was Deficient Because it Omitted a Pivotal Element of the Crime: Unstamped Cigarettes Must be Subject to Tax.*

24. The People argue Tax Law § 1814(c)(2) is comprised of the following three elements: (1) the defendant was not an agent licensed by the commissioner and (2) the defendant willfully possessed or transported cigarettes for the purpose of sale (3) and thirty thousand or more unstamped cigarettes were possessed. *See* Affirmation of Jonathan Becker, at ¶31.

25. The People, however, entirely omit a necessary element stated in the plain language of §1814(c)(2). Specifically, the People failed to explain that a guilty person must "willfully [poses or transport] for the purpose of sale . . . **cigarettes subject to the tax** imposed by section four hundred seventy-one of this chapter." N.Y. Tax Law §1814(c)(2).

26. In a misguided attempt to obscure this fatal omission, the People reference Tax Law §471, which states "it shall be presumed that all cigarettes within the state are subject to tax." Even if this presumption was presented adequately, and it was not, a presumption cannot be used to obliterate an element of a crime.

27. The People argue that "**[a] presumption** does not shift the burden of proof, it **simply relieves the prosecutor of having to prove that element.**" *See* Affirmation of Jonathan Becker, at ¶71. This argument fails because a presumption cannot remove an element of a crime entirely. Additionally, for the presumption to operate, the People must prove the underlying factual basis which justifies the presumption.

28. The People also appear to have failed to explain to the Grand Jury that the "willfully" *mens rea* applies to the attendant circumstance that the cigarettes must be subject to tax. In this regard, New York Penal Code Section 15.15(1) states, "[w]hen one and only one [culpable mental state] appears in a statue defining an offense, **it is presumed to apply to every element of the offense.**"

29. The People, however, failed to inform the Grand Jury of the element of the crime that the cigarettes must be subject to tax. It follows that the People also failed to instruct the Grand Jury about the applicability of the "willful" *mens rea* to the very same element.

30. Having failed to properly instruct the Grand Jury that the Defendant must have **willfully** possessed or transported cigarettes **subject to tax** to be convicted of New York Tax Law § 1814(c)(2), the People's charge was fatally flawed.

***B. The People Erred in Failing to Present Possibly Exculpatory Evidence to the Grand Jury Because the same evidence supported a Complete Defense Based on Insufficiency of the Evidence.***

31. The Ernst Memorandum was possessed by the Defendant and presented to the New York State Police at the time of the seizure of the Native American tobacco products. We know from the People's response that the Ernst Memorandum was not

presented to the Grand Jury. Therefore, it can reasonably be inferred that the Grand Jury never was presented with evidence that the Ernst document was possessed by the Defendant and presented to State Police Troopers. This evidence should have been presented to the Grand Jury since it was known to the prosecutor handling the case and clearly established that the Defendant lacked the requisite *mens rea* that he willfully transported cigarettes subject to tax.

32. The People are generally correct in stating that they are not required to submit *all* possibly exculpatory evidence to a Grand Jury. *See People v. Lancaster,* 69 NY2d 20 (1986). However, the People ignored relevant language in the same opinion on which they relied: "the extent of the prosecutor's obligation to instruct the Grand Jury on a particular defense depends upon whether that defense has the 'potential for eliminating a needless or unfounded prosecution.'" *Id. at* 27 (citations omitted).

33. The type of "defense that has the potential for eliminating a needless or unfounded prosecution" is more fully defined in *People v. Calbud, Inc.*, which states:

> **We deem it sufficient if the District Attorney provides the Grand Jury with enough information** to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence **to establish the material elements of the crime.**

49 N.Y.2d 389, 394-95 (1980) (emphasis added).

34. It is additionally worth noting that despite your deponent's conversations with the Deputy Superintendent of the New York State Police and Mr. Ernst personally at DTF in the weeks leading up to the Grand Jury presentation, the Defendant was not given the courtesy of being informed of the Grand Jury presentation. While the Defendant is aware that such notice is not statutorily required in this case, such a courtesy would have

allowed the Defendant to be present at the Grand Jury and present evidence regarding the Ernst Memorandum, evidence that would have provided a successful defense to the charged crimes and eliminated this need for trial in this case.

35. Here, the People failed to provide the Grand Jury with enough information to establish the material elements of § 1814(c)(2). Both the Ernst Memorandum and the Senators' Letter indicate the Defendant *did not know* the cigarettes he was carrying were subject to tax. Had the People complied with its duty to provide evidence of a complete defense to the Grand Jury, this "needless and unfounded prosecution" could have been avoided.

36. Finally, the question of whether the Ernst Memorandum is an "official statement or interpretation" pursuant to N.Y.C.P.L. § 15.20(2) is irrelevant to the memorandum's status as evidence supporting a complete insufficiency of the evidence defense. The Ernst Memorandum and its possession by the Defendant at the time of the seizure goes to the heart of the question of whether the Defendant possessed the requisite the *mens rea* component of §1814(c)(2), and is therefore relevant to a grand jury on those grounds alone.

### *C. The People Failed to Adequately Charge the Grand Jury as to Whether the Presumption Created by Tax Law §471 was Both Rebuttable and Permissive, Thereby Impermissibly Shifting the Burden of Proof to the Defendant.*

37. The People assert that the Jury was charged with the presumption that unstamped cigarettes in New York are subject to tax. *See* Affirmation of Jonathan Becker, at ¶¶ 33; 34; and 67. While the People correctly point out that all legal presumptions in New York are permissive, rather than mandatory, the People's assertion that "[a] presumption does not shift the burden of proof, it simply relieves the prosecutor

of having to prove that element," is grossly inaccurate. *See In re Raquel M.*, 99 NY2d 92 (2002). In total, in *Raquel* the Court of Appeals states:

> A permissive presumption is one that allows, but does not require, the trier of fact to accept the presumed fact, and does not shift to the defendant the burden of proof. The permissive presumption is rebuttable, whether by defendant's own testimony or by any other evidence in the case . . . .

*Id.* at 95 (internal quotations omitted).

38. In other words, a permissive presumption allows the People to substitute an unproven fact for a proven fact, but this substitution is *always* rebuttable. *See id.*

39. Further, while the People correctly instructed the Grand Jury that the possession of unstamped cigarettes was presumptive evidence that could be substituted for the alleged fact that the cigarettes were subject to tax, the People failed to make clear to the Grand Jury that the fact being substituted was an *element of the crime*, or that the presumption was both *permissive and rebuttable*.

40. Also important to the present situation is that the overwhelming weight of precedent reveals, "whenever the prosecution does charge the presumption, such **charge must include** an indication that the presumption is permissive and rebuttable." *People v. Renaud*, 7 Misc. 3d 260, 265 (N.Y. County Ct. 2004) (emphasis added); *see also People v. Williams*, 136 A.D.2d 132, 135-37 (2d Dep't 1988) (dismissing indictment for failure to instruct Grand Jury presumption is rebuttable); *People v. Hester*, 133 A.D.2d 302, 303 (1st Dep't 1987) (dismissing indictment for failure to instruct Grand Jury presumption is permissive and rebuttable); *People v. Nelson*, 127 Misc. 2d 583, 588-89 (N.Y. Sup. Ct. 1985) ("*Sandstrom v Montana* (442 U.S. 510 [1979]) mandates not only that a petit jury be clearly instructed as to rebuttable nature of this presumption but that a Grand Jury be

similarly advised"); *People v. Garcia*, 103 Misc. 2d 915, 917-18, (N.Y. Co. Sup. Ct. 1980) (dismissing indictment for failure to instruct Grand Jury presumption is permissive and rebuttable).

41. Here the People admit that the Grand Jury was merely instructed "[all] cigarettes in the State are presumed taxable." *See* Affirmation of Jonathan Becker, at ¶¶ 57; 67; 71; and 72. The recitation of a statutory presumption, however, does not sufficiently explain that it is rebuttable. *See Williams*, 136 A.D.2d at 136 ("[T]he recitation of the statutory language set forth in Penal Law § 265.15(3) without further explanation as to the permissive nature of the presumption, would have a misleading effect."). The People's instruction is therefore facially invalid because it fails to mention the presumption is both permissive and rebuttable. The egregiousness of the People's error requires the charges be dismissed with prejudice.

42. Finally, the People actively concealed evidence (the Ernst Memorandum and the Senators' letters) which rebuts the presumption of taxability. For these reasons, the indictment should be dismissed.

***D. The People's Charge to the Grand Jury was Flawed because it Incorporated the Wrong Definition of the Mens Rea Element "Willfully".***

43. The People state that the Grand Jury was charged with the definition of "willfully" pursuant to New York Tax Law § 1801(c). *See* Affirmation of Jonathan Becker, at ¶67.

44. This definition, however, is both over-inclusive and incorrectly applied.

45. As explained at length in the Defendant's initial moving papers, the appropriate definition of "willfully" is provided by N.Y. Penal Code § 15.05(2), which states:

> **A person acts knowingly** with respect to conduct or to a circumstance described by a statue defining an offense **when he is aware** that his conduct is of such nature or **that such circumstance exists.**

N.Y. Penal Code § 15.05(2) (emphasis added).

46. In stark contrast, Section 1801(c) states:

> **For purposes of this subdivision**, the term **"willfully" shall be defined to mean** acting with either intent to defraud, intent to evade the payment of taxes or **intent to avoid a requirement of this chapter**, a lawful requirement of the commissioner or a known legal duty.

New York Tax Law § 1801(c) (emphasis added).

47. The People's definition expands "willfully" to include "intentionally avoiding a requirement of this chapter," i.e. intentionally transporting unstamped cigarettes, rather than following the N.Y. Penal Code defined term "knowingly" which is specifically tailored for attendant circumstances such as possessing cigarettes subject to tax, i.e. awareness that the possessed cigarettes are subject to tax.

48. More importantly, the definition provided by the People and found in New York Tax Law § 1801 is entirely inapplicable to the current charges.

49. The plain language of the People's definition restricts its applicability to "the purposes of this subdivision." "Subdivision" only refers to Section 1801's definition of "tax fraud acts". The definition of "willfully" does not, and by the plain language of Section 1801(c) cannot, apply to Section 1814(c)(2), which is not only found in a different subdivision but an entirely different "Part" of Article 37 of the Tax Law.

50. In fact, a previous prosecution under Section 1814(c)(2) did not use the People's 1801(c) definition of willfully. *People v. McKelvey*, 2005 N.Y. Misc. LEXIS 3569, *5 (N.Y. City Crim. Ct. 2005).

51. In *McKelvey*, the court stated:

> Willful is defined as proceeding from a conscious motion of the will; voluntary. **It may also be described as** intentionally, knowingly and purposely **without justifiable excuse as distinguished from** an act done carelessly, thoughtlessly, needlessly, or **inadvertently** . . . .

52. *Id.* (internal citations omitted). In *McKelvey*, the court ruled that "the accusatory instrument and the supporting deposition fail to allege or show that the defendant acted 'willfully' [as defined above]. As a result, the court finds that the accusatory instrument is defective . . . ." *Id.*

53. Here, the People have arbitrarily chosen an over-inclusive and inapplicable definition for "willfully" that flies in the face of the plain language of Section 1801(c), and defies established case law. The charges should therefore be dismissed.

### *E. The People Fail to Acknowledge that the Defendant Does Not Bear the Ultimate Incidence of the Cigarette Tax.*

54. The People allege that pursuant to Tax Law Section 471(1), "there is a tax on *all* cigarettes possessed in the state by any person for sale." *See* Affirmation of Jonathan Becker, at ¶48. This statement is patently false. In its entirety, Section 471(1) states:

> There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, **except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax**, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation . . . .

New York Tax Law §471(1).

55. Furthermore, Tax Law §471(2) states: "**It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer.**"

56. The People have failed to explain how the Defendant can be criminally liable for cigarettes "subject to tax", when the Defendant is *statutorily barred* from bearing the incidence and liability for the tax. The People have also, by their own admission, selectively edited Tax Law Section 471 before presenting it to the Grand Jury, thereby omitting any reference to who bears the incidence of the tax, or in what situations the State has no power to impose a tax. *See* Affirmation of Jonathan Becker, at ¶57.

57. The People's incomplete presentation of Section 471(1) created the misleading impression that all cigarettes in New York State are taxable, regardless of who the ultimate consumer is. The People have failed in their duty to adequately charge the Grand Jury, and as such the indictment should be dismissed.

### *F. The People Improperly Charged the Grand Jury that New York Law Does Not Differentiate Between Taxable and Non-Taxable Cigarettes.*

58. The People's reliance on the presumption of taxability does not relieve them of the burden of proving the Defendant's cigarettes were "subject to tax" pursuant to Section 1814(c)(2). The People admit that the Grand Jury was instructed that *all* cigarettes are subject to tax under New York Law. *See* Affirmation of Jonathan Becker, at ¶72. This instruction was misleading and improper. Contrary to the People's assertion that New York Law does not differentiate "what types of cigarettes are 'subject to tax", Tax Law Section 471(1) clearly states: **"no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax."**

59. The People's "misstatement" of the law can only be viewed as an attempt to cure their obvious inability to prove the cigarettes in the Defendant's possession were subject to tax. The indictment should be dismissed.

**POINT IV**
**DISMISSAL BASED ON PENAL LAW § 15.20(2)**
**("MISTAKEN BELIEF") IS APPROPRIATE**

60. The Defendant's motion to dismiss based on his belief that the DTF's policy regarding enforcement and prosecution of New York Tax Law in the present situation fits squarely within the confines of N.Y.C.P.L. § 210.20. Specifically, subsections "h" and "i" provide for dismissal where:

> (h) There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or
>
> (i) Dismissal is required in the interest of justice, pursuant to section 210.40.

N.Y.C.P.L. § 210.20(h-i).

61. In the present case, both subsections "h" and "i" provide grounds for dismissal based on the Defendant's belief that the conduct was legal, as set forth by the DTF's Richard Ernst.

62. Specifically, as explained in detail below, the inability of the People to ever prove that the Defendant knew the cigarettes were subject to tax provides a legal impediment and thus dismissal is appropriate pursuant to N.Y.C.P.L. § 210.20(h).

63. Additionally, as set forth below, the Defendant's justified reliance on an official statement of the DTF provides ample grounds to dismiss all charges in the interest of justice as set forth in N.Y.C.P.L. § 210.20(i).

64. The People's argument that the Ernst Memorandum was not an "official statement" because it was not meant for general circulation fails.

65. The fact is that the DTF has known for quite some time that the Ernst Memorandum has been available to the general public and has never retracted it. *See* Affirmation of Jonathan Becker, at Ex. 3. In their own opposition papers, it is clear that the DTF was aware that the general public had knowledge of Ernst Memorandum well before the shipment in question in this case was seized. *See id.*. The DTF, however, never retracted or sought to clarify the Ernst directive and in fact continues to abide by it:

> Since the time that the policy [outlined in the July 6, 2011 email of Deputy Commissioner Ersnt] was adopted, **it has never been revoked. It remains in effect today**, although it is subject to change by DTF at any time.

*Id.*, at Ex. 3, p. 4 (emphasis added).

66. Simply put the People (and more specifically the DTF) had the opportunity to clarify or retract this statement and never did. Instead they simply allowed the general public and more particularly Native American entities to continue to rely on it.

67. Additionally, contrary to the People's suggestion, it is within the DTF's jurisdiction to interpret New York's Tax Laws. In fact, the DTF is the very body legally charged with interpreting and enforcing this statute. *See* N.Y. Tax § 171.

68. Finally, the People claim that the Defendant did not provide the People with reasonable notice pursuant to N.Y.C.P.L. § 210.45. This claim is, however, misplaced as the People had ample opportunity to respond to the present motion.

69. In this regard, upon receipt of the present motion Assistant District Attorney Becker requested an extension of time to file his opposition papers. Your

deponent granted this request giving the People ample opportunity to investigate and respond to the Defendant's motions. Therefore, any argument that the People did not have the requisite time to respond to Defendant's motion must be rejected. In addition, the St. Lawrence County District Attorney is presently engaged in another case of similar impression before this Court wherein the significance of the Ernst directive is also being litigated.

**POINT V**
**THE STATUTORY PRESUMPTION**
**RELIED ON BY THE PEOPLE IS UNCONSTITUTIONAL**

70. The People argue that the Defendant's argument regarding constitutionality "needlessly confuses the issues before the Court." *See* Affirmation of Jonathan Becker, at ¶106. To the contrary, the constitutionality of the presumption regarding taxability of cigarettes is directly on point to the present motion and at the very heart of this matter.

71. While the taxing scheme (stamping system) at play here has been determined to be constitutional (*see Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), there has yet to be a judicial determination that the **presumption** that the scheme relies on is constitutional.

72. As set forth in the Defendant's initial moving papers, Section 1814 creates a presumption that if the cigarettes are not stamped, they are necessarily subject to tax:

> For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages **shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter**. . . .

N.Y. Tax Law § 1814(d) (emphasis added).

73. The People go to great length to argue why there is a substantial likelihood that the cigarettes at issue here were not for personal use and were instead for resale. This argument, however, misses the point.

74. The issue here is not whether the cigarettes were for resale, but if the cigarettes were "subject to the tax imposed" by New York State Tax Law Section 471.

75. It is the presumption of taxability (which the People ignore), not the presumption that the cigarettes will be resold, that is unconstitutional.

76. The unconstitutionality stems largely from the fact that New York State Tax Law makes clear "the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y. Tax § 470 (emphasis added). Importantly, the People do not dispute that the Defendant is not a consumer. *See* Affirmation of Jonathan Becker, at ¶¶119-20.

77. Accordingly, cigarettes are subject to New York State taxes only if the legal incidence of the tax falls on a consumer who is not categorically barred from bearing the legal incidence of the tax. When the ultimate consumer is a Native American who purchases cigarettes on his or her own reservation for his or her own use, the State is categorically barred from imposing a tax.

78. Said another way, if the cigarettes at issue were ultimately sold to Native American consumers on their own reservation, the cigarettes cannot be "subject to tax" pursuant to New York State Tax Law Section 471. The People have attempted to confuse this issue by arguing that the fact that the Defendant is not a member of the St. Regis Mohawk Tribe is somehow relevant. *See* Affirmation of Jonathan Becker, at ¶¶105. The fact that the Defendant is a Seneca and not a Mohawk is of no consequence here. What

matters is that (1) the Defendant is not a consumer and (2) there is no way of ever knowing who the ultimate consumer will be.

79. As set forth in detail in the Defendant's initial moving papers "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, **unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from proved fact on which it is made to depend.**" *Leary v. United States*, 395 U.S. 6 (1969) (emphasis added).

80. Here, however, there is no reasonable connection between simply possessing cigarettes and a determination that the cigarettes will eventually be purchased by a consumer subject to the tax. *See Tot v. United States*, 319 U.S. 463 (1943).

81. This connection (possession and taxability) is completely ignored by the People in their opposition papers. For these reasons, and the reasons set forth in the Defendant's initial moving papers, all charges against the Defendant must be dismissed with prejudice.

## POINT VI
## ALL COUNTS SHOULD BE DISMISSED IN FURTHERANCE OF JUSTICE

82. To the extent that the People request a hearing on the Defendant's motion to dismiss in the interest of justice, the Defendant joins in said request provided that the People are required to respond to the Defendant's document demands prior to the hearing, as the information demanded is directly related to the grounds that the Defendant seeks dismissal.

*A. People's Points X(A) and X(B): The Seriousness of the Crime and the Extent of Harm Caused by the Offense.*

83. In opposition to Points X(A) and X(B) of the Defendant's motion, the People once again rely on the presumption that the cigarettes at issue in the present case are "subject to tax". In fact, the People outlandishly state "[t]hat the cigarettes are taxable is incontrovertible." *See* Affirmation of Jonathan Becker, at ¶138. Nothing could be further from the truth.

84. As detailed above (*see* Point V), the presumption that the cigarettes are "subject to tax" is unconstitutional. There is simply no proof that the cigarettes here, which were manufactured by, sold by, and purchased by a Native American business, are in fact subject to tax. Moreover, pursuant to New York Tax Law, the incidence of the tax falls on the ultimate consumer. Here it is not disputed that the Defendant is not a consumer and thus any harm by the Defendant's failure to pay a tax has not yet been caused. Said harm can only be created if and when a consumer required to pay a tax does not. Accordingly, because there is no proof that the cigarettes are "subject to tax" any reliance by the People on the seriousness of harm is misplaced. Simply put, there is no cognizable harm.

85. In a desperate attempt to obscure the fact that this criminal prosecution is fatally flawed, the People resort to unsupported and sophomoric hyperbole. To connect the conduct of the Defendant in this case (even assuming for argument purposes that it violated the law, which it did not) to the financial crisis in New York State, let alone in the foreign country of Greece, are simply not worthy of the Court's time and consideration. *See* Affirmation of Jonathan Becker, at ¶¶132-133.

86. Finally, the People attempt to make the argument that the Defendant has somehow stolen from those affected by illnesses caused by smoking. *See* Affirmation of Jonathan Becker, at ¶142. Following this illogical argument through, the People argue that Non-natives buying Native cigarettes on reservations across New York without paying tax are somehow accomplices in stealing from those affected by illnesses caused by smoking. This argument is entirely frivolous and must be rejected

***B. People's Point X(C): Evidence of Guilt.***

87. As explained above, there is absolutely no evidence that the Defendant is guilty of the charges brought against him and the People cannot prove that the Defendant willfully violated New York's Tax Laws. To the contrary, there is overwhelming evidence that the Defendant did not "willfully" transport unstamped cigarettes "subject to tax".

88. As already discussed in the Defendant's initial moving papers, the Defendant relied on the Ernst Memorandum in transporting the cigarettes at issue. The Defendant will not repeat these arguments herein and is confident that the argument presented in its initial papers is sufficient to warrant a dismissal.

***C. People's Point X(D): The history, character and condition of the Defendant.***

89. As the People recognize, the Defendant has no criminal convictions in the State of New York. While the Defendant was convicted of a misdemeanor stemming from an incident when he was 19 years old, it is respectfully submitted that there is no pattern of criminal conduct as the People would lead this Court to believe.

90. The People argue that a lack of criminal history is not grounds for a dismissal. *See* Affirmation of Jonathan Becker, at ¶153. It is respectfully submitted that a

small criminal history should not hinder a dismissal either. Instead, this Court should concentrate on the Defendant's background as a husband, father, and businessman as outlined in the Defendant's initial moving papers, which the People have curiously failed to refute or even argue against.

### *D. People's Point X(F): The Purpose and Effect of Imposing Upon the Defendant a Sentence Authorized by the Offense.*

91. The People make the Orwellian argument that a conviction in the present case will provide the Defendant with supervision that he is "seemingly in desperate need of" and for reasons arising from entirely separate matters without any connection to the present case. *See* Affirmation of Jonathan Becker, at ¶159. The basis for this argument appears to be the DA's belief that the Defendant has not received proper punishment for his past indiscretions. This entire argument is misplaced and must be ignored.

92. The simple fact remains, as set forth in the Defendant's initial papers, that any conviction will further polarize Native Americans who reside in New York State and the government of the State of New York. This case will be viewed as simply another battle between Native Americans and New York State over sovereignty, treaty rights and taxation. Simply put, any conviction will not deter any future conduct. Dismissal is thus appropriate.

### *E. People's Point X(G):The Impact of a Dismissal Upon the Confidence of the Public in the Criminal Justice System.*

93. The People's suggestion that the citizens of New York State elect legislators to repeal the 2009 tax amendments if they wish to prevent the Defendant from being prosecuted is ludicrous.

94. First, such a suggestion suggests that the citizens of this state vote based solely on the issue of Native American taxation – they certainly do not.

95. Second, and more importantly, some New York's legislators have already opined that the Tax Law **does not apply** to the current situation. In fact, as discussed in detail in the Defendant's initial moving papers, New York State Senators George Maziarz and Tim Kennedy wrote to Thomas Mattox, the Commissioner of the New York State Department of Tax and Finance, on May 16, 2011 stating:.

> It is our view that the **State should not pursue an effort to collect taxes on Native Brands** because such an effort would be contrary to the **sovereign rights of the Native Nations** . . . .

*See* Affirmation of Dennis C. Vacco, at Ex. C (emphasis added).

96. As explained in the Defendant's initial moving papers, any prosecution, running contrary to the DTF's directive and the interpretation of the statute from New York's lawmakers, would cause the citizens of the State of New York to lose a substantial amount of confidence in the criminal justice system. All charges against the Defendant should therefore be dismissed.

### *F. People's Point X(H): The Impact of a Dismissal Upon the Safety or Welfare of the Community.*

97. The People argue that a dismissal will create a haven for smugglers in Saint Lawrence County and that a dismissal will prevent the State from enforcing taxes on legitimate businesses. This claim is utterly outrageous.

98. The charges here should be dismissed because no law has been broken. Because no law was broken, there is no threat that taxes can no longer be collected or that smugglers will somehow run rampant in Saint Lawrence County.

### G. *People's Point X(I): The Attitude of the Complainant or Victim with Respect to the Motion.*

99. As explained above, the DTF has not, contrary to the People's suggestions, made it clear that New York's Tax Laws apply to the present situation. In fact, the DTF appears to have taken the very opposite position in the memorandum of Richard Ernst.

100. As made clear in the above argument and in the Defendant's original moving papers, the DTF has taken the position (and never changed this position) that the cigarettes in this matter should not have been seized and in the same regard, the Defendant should not be prosecuted.

101. Clearly, the attitude of the New York State Department of Tax and Finance Defendant warrants a dismissal in the furtherance of justice.

### H. *People's Point X(K)[1]: Any Other Relevant Facts Indicating that a Judgment or Conviction would serve no useful Purpose.*

102. In opposing the Defendant's motion to dismiss on the interest of justice, the People have completely ignored the complicated constitutional and political arguments made by the Defendant in his initial moving papers. Instead, the People have decided to treat this case as if it is a simple tax evasion case. It is respectfully submitted that this case is anything but simple.

103. As more fully explained in the Defendant's initial moving papers, the present case affects much more than just the Defendant and has far reaching implications for Native Americans' sovereignty, economic, and treaty rights across New York State.

[1] It appears that the People have inadvertently not included a Point X(J), and have skipped from subsection I to subsection K.

104. Here the District Attorney's Office is using the Defendant as a pawn in a rogue prosecution in which the District Attorney is attempting to advance her own interpretation of complicated legal issues despite official policy statements of the New York State Department of Tax and Finance and questions regarding ambiguity in the law from New York State's own lawmakers.

105. As the DTF has acknowledged, different State and local agencies have interpreted New York's Tax Law differently and have not enforced it consistently. *See* Affirmation of Jonathan Becker, Ex. C, at ¶23. It is respectfully submitted that the Defendant here should not be prosecuted when the State of New York, as a whole, has been unable to determine whether or not the Tax Laws apply to situations like the present.

106. For these reasons, and the reasons outlined in the Defendant's initial moving papers, all charges against the Defendant should be dismissed.

## POINT VII
## ADDITIONAL MOTIONS PURSUANT TO CPL 255.20

107. The People claim that any additional motions are time-barred pursuant to N.Y.C.P.L. 255.20. This claim is entirely incorrect.

108. Section. 255.20 provides in pertinent part as follows:

> the court must entertain and decide on its merits, at anytime [sic] before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one of this section or included within the single set of motion papers as required by subdivision two.

N.Y.C.P.L. 255.20(3)

109. Based on the volume of evidence that appears not to have been provided by the People and that is currently unavailable to the Defendant, it appears likely that after additional disclosure additional motions may be necessary.

110. Accordingly, the People's claim that further motions of the Defendant based on grounds or evidence unavailable to the Defendant at this time are time barred must be summarily rejected.

WHEREFORE, Defendant requests an Order granting the relief set forth in the Notice of Motion, together with any such further relief the Court deems just and proper.

DATED: Buffalo, New York
August 27, 2012

LIPPES MATHIAS WEXLER FRIEDMAN LLP

Dennis C. Vacco, Esq.
Attorneys for Defendant, Seth Snyder
665 Main Street, Suite 300
Buffalo, New York 14203
(716) 853-5100

# EXHIBIT A

Lippes Mathias Wexler Friedman LLP

*Richard M. Scherer, Jr.*
Associate
rscherer@lippes.com



July 3, 2012

Via Electronic and Regular Mail
Stephen Easter, Esq. (seaster@nycourts.gov)
St. Lawrence County Courthouse
48 Court Street
Canton, New York 13617

Re: People v. Seth Snyder
Index No. 21112

Dear Mr. Easter,

We are writing to confirm that Assistant District Attorney Jonathan Becker has agreed to our request for an extension to file any motions in the above-referenced matter. In this regard, Defendant's motions, which were previously to be served by July 5, 2012, now must be served by July 12, 2012. If you should have any questions, please feel free to contact me.

Approved
DDR
7/6/12

Very truly yours,

LIPPES MATHIAS WEXLER FRIEDMAN LLP

By: Richard M. Scherer, Jr.

cc: Dennis C. Vacco, Esq.
Jonathan Becker, Esq.

# Exhibit D

STATE OF NEW YORK
COUNTY COURT: ST. LAWRENCE COUNTY

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

ANDREW W. MUNCH and
SETH A. SNYDER,

Defendant

ORDER
Indictment # 2012-137
Index # 21112

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Appearances: The People of the State of New York, by Hon. Nicole M. Duvé, District Attorney
Jonathan Becker, Esq., of counsel
Defendant Seth A. Snyder, by Lippes Mathias Wexler Friedman LLP,
Dennis C. Vacco, Esq. and Richard M. Scherer, Jr., Esq. of counsel

JEROME J. RICHARDS, J.

Defendant is charged in count 1 with acting in concert with another person in the possession or transportation of unstamped cigarettes [Tax Law § 1814(c)(2)]. Count 2 charges the other person, Andrew W. Munch, with acting in concert with defendant in the same conduct as is charged in count 1. The charged acts allegedly occurred on March 2, 2012 in this county.

Defendant filed an omnibus motion on July 13, 2012. The People responded on August 9, 2012, and the court heard oral argument on the motion on September 11, 2012, and thereafter reserved decision.

The first branch of the motion is a motion to compel a response to a previous demand for discovery. Initially the defense seeks *Brady* material which is either exculpatory or materially helpful to the defense. Specifically, the defense seeks documents relating to the New York State Department of Taxation and Finance policies and procedures for the taxation of Native American cigarettes. See Vacco affirmation ¶8. In response the People assert that the requested documents are not discoverable under CPL §240.20 and are in any case not relevant to the guilt or innocence of defendants. The People view the demand as insufficient because it fails to state a good-faith basis for the belief that the records would be relevant and exculpatory. The People have refused the request. Furthermore, the People aver that they have already disclosed, on a disclosure DVD at time of arraignment, all discoverable material within their possession. Since the defense has not identified why the People's response is inadequate in terms of their statutory obligation under

CPL §240.40, this branch of the motion is denied pursuant to CPL § 240.20(1)(b). The People have shown good cause why this branch of the motion should not be granted.

The second branch of the motion seeks disclosure under CPL §240.43 of specific instances of defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial to impeach defendant's credibility if he testifies. The People respond, correctly, that the demand is premature, since the statute directs such disclosure immediately before commencement of jury selection. By virtue of the demand the People are on notice of their duty to disclose such information in due course, without further prompting. The court notes that the People's response incorrectly refers to the defense demand as one for *Molineux* information. It is the court's understanding that *Molineux* relates to prior crimes or bad acts which the People hope to use at trial as part of their case in chief, and not solely for impeachment purposes. CPL §240.43 is thought to be a statutory codification of the evidentiary rule allowing impeachment use of prior bad acts. The People are required to disclose – at the appropriate time under CPL§240.43 – material they intend to use for impeachment. The People are required to seek permission by motion, on the eve of trial, to use *Molineux* material on their case in chief, because of the requirement that they satisfy the court of the basis for such use.

The third branch request for a *Sandoval* hearing is granted, and it will be conducted on the eve of trial. The defense should be prepared to identify previous convictions of the defendant as to which it would be unduly prejudicial if defendant were cross-examined about them. On these two branches of the motion the court will direct a hearing, to be conducted with a *Sandoval* hearing, on the eve of trial.

The People have refused defendant's fourth branch of the motion, for a bill of particulars, because the defense has already received substantial open file discovery, and because the People believe that the demand is untimely. It seems to the court that much of the demand seeks information about how the People intend to prove their case, rather than particulars of the crime itself. However, CPL 200.95 defines the kinds of information to which a defendant is entitled. The People's self-serving and somewhat disingenuous assertion that they have already disclosed all or most of what defendant requests through the open file discovery process is not helpful because it is not specific. Therefore, with respect to the first count of the indictment, the People are directed to file and serve written particulars as requested in request A (exact date, time, place

and location of the alleged crime); request B (whether defendant is charged as principal or as accomplice); requests C, D and E (defendant's conduct) but only as to his conduct without regard to the relevance of any portion of the conduct to specific elements of the crime. Requests F, G, H, I, J, K, L and M are denied as not authorized for a bill of particulars.

With respect to the second count of the indictment, the People are directed to file and serve written particulars as requested in request N (exact date, time, place and location of alleged crime); request O (role of defendant as principal or accomplice); requests P, Q and R (defendant's conduct) but only as to his conduct without regard to the relevance of any portion of the conduct to specific elements of the crime. Requests S, T, U, V, W, X, Y and Z are denied as not authorized for a bill of particulars.

The fifth branch of the motion seeks court review of the grand jury minutes to determine the legal sufficiency of the evidence, and the sixth branch seeks disclosure of those minutes to defense counsel to assist in that process. Disclosure to counsel is not required in order to help the court resolve the issues presented, so the sixth branch of the motion is denied. The fifth branch of the motion, to inspect the minutes, is granted. Following such review the court finds that the evidence was legally sufficient to give the grand jury reasonable cause to believe that defendant committed the crime charged in count 2. The evidence established that defendant is not an agent licensed by the Commissioner of Taxation and Finance; that defendant willfully possessed and transported thirty thousand or more cigarettes subject to the tax imposed by New York Tax Law §471; that such possession and transport were for the purpose of sale, and that such cigarettes were in unstamped packages. The motion to dismiss for lack of legally sufficient evidence is therefore denied. Count 1 as to the co-defendant Andrew W. Munch was previously dismissed by the court as multiplicitous, in an order dated May 31, 2012. Count 2 was amended in the decision relating to Mr. Munch, and is therefore amended here as well, for the same reasons, to charge both defendant Munch and Snyder with acting in concert. Concurrently with the amendment of count 2, count 1 is dismissed as multiplicitous against defendant Snyder. The net result of these amendments is that count 1 is dismissed against both defendants, and count 2 is amended to charge both with acting in concert as alleged in count 2.

The grand jury was instructed as to the presumptions stated in Tax Law §1814(d) and Tax Law §471(1). The definition of "willfully" was drawn from Tax Law §1801(c). Other defined terms were charged based on Tax Law §470 definitions. Instructions were given concerning

accomplice liability and corroboration of a defendant's statements. The court agrees with the prosecution that the presumption in Tax Law §1814(d) does not shift the burden of proof, but merely relieves the prosecutor of needing to prove that element directly. The motion to dismiss the indictment based on faulty or inadequate legal instructions is denied.

Branch seven of the motion seeks a suppression hearing to address the legitimacy and basis for the combined Border Patrol and New York State Police checkpoint stop leading to the arrest and seizure of cigarettes in this case. As argued by the People's response, ¶ 30-35 of defense counsel's affidavit does not state the sources of information and belief as to the basis for the police stop, and does not provide particulars supporting counsel's view. Nothing in the defense affirmation establishes a basis on which the stationary Border Patrol checkpoint stop could be found to be without probable cause, or that it produced illegally obtained evidence. See CPL 710.60(3). The motion for a hearing leading to suppression of the fruits of the stop (the cigarettes) is therefore denied.

In the eighth branch of the defense motion counsel argues that defendant was acting under a good faith though perhaps mistaken belief that his conduct was legal. In support of this argument, defense counsel points to an internal memorandum from a Deputy Commissioner of Taxation and Finance to tax enforcement personnel purporting to direct them not to make seizures of untaxed native American cigarettes being transported from one reservation to another within New York State, based on the limited exemption in Tax Law §1842. Defense counsel argues that this memo was an official pronouncement by a senior state tax official, and that it carried the weight of law. The People contest that argument and also opine that at most the issue presents a defense to be raised at trial, but that it provides no basis for dismissal of the indictment. The People are correct, and the motion to dismiss on this basis is denied.

In the ninth branch of the motion defense counsel argues that Tax Law §1841(c)(2) and 471 are unconstitutional as applied to defendant. The defense argument builds on the provision in Tax Law §471 that the state is without power to impose the tax, including sales to qualified Indians for their own use and consumption on their nations' or tribes' qualified reservation. But the defense argument is not with this provision so much as it is with the notion that the State must show that the cigarettes in question are subject to tax. The People respond that defendant has not claimed to be a member of the St. Regis Mohawk tribe, and that all cigarettes are presumed taxable under §471. Nor does the statute impermissibly shift the burden of proof to the

defendant to show that he is exempt from the tax, despite defendant's argument that the §1814(d) presumption that unstamped cigarettes are possessed for purposes of sale forces defendant to prove his innocence because he is an Indian.

Notwithstanding the sometimes uneasy relationship between New York's cigarette tax enforcement policies on the one hand and the quasi-sovereign rights, whatever they may be, of recognized Native American tribes to conduct their own commerce with each other without interference by state law enforcement personnel on the other hand, the fact remains that both state and federal law recognize that New York can tax cigarettes sold by one tribe to another. *Oneida Nation of New York v. Cuomo*, 645 F3d 154 [2 Cir 2011]; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 US 134 [1980]. The court therefore agrees that the statutory presumption of intent to sell the cigarettes, based on the quantity possessed, is constitutional. The defense is of course free to argue these policy issues with a higher court, but at this stage this court is required to apply the statutes as written, and nothing has shown them to be irrational, overly broad or unrelated to the purpose for which they were enacted. Nor has it been shown that the statutes do not apply to the cigarettes seized in this case. This branch of the motion is therefore denied.

Lastly the defense argues that the indictment should be dismissed in furtherance of justice, under CPL §210.40. Such a motion requires the parties to address, and the court to find, that there is some compelling factor or circumstance clearly demonstrating that conviction or continued prosecution would be unjust. *People v. Rickert*, 58 NY2d 122 [1983]. In evaluating such a request the court is required to consider, individually and collectively, (a) the seriousness and circumstances of the offense; (b) the extent of harm caused by the offense; (c) the evidence of guilt, whether admissible or inadmissible at trial; (d) the history, character and condition of the defendant; (e) any claimed exceptionally serious misconduct of law enforcement; (f) the purpose and effect of imposing upon defendant an authorized sentence; (g) the impact of a dismissal on the confidence of the public in the criminal justice system; (h) the impact of a dismissal on the safety or welfare of the community; (i) where the court deems it appropriate, the attitude of complainant or the victim with respect to the motion; and (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose. As CPL §210.40 provides, such a motion is addressed to the sound discretion of the court.

Appellate cases have repeatedly held that dismissals in furtherance of justice are to be

granted sparingly, and only when some compelling factor leads the court to conclude that continued prosecution would be unjust. It is often advisable for the court to conduct a hearing before ruling on such motions. See generally, *People v. Clayton,* 41 AD2d d675 [2d Dept 2003]; *People v. Quadrozzi*, 55 AD3d 93, 103 [2d Dept 2008], *app den* 12 NY3d 761 [2009]; *People v. Martinez*, 304 AD2d 675 [2d Dept 2003]; *People v. Diaz*, 97 NY2d 109, 113 [2001]. In the present case, the attorneys have addressed the furtherance of justice factors (CPL 210.40) in exhaustive detail, and the court has considered them, individually and collectively. The basic facts of the alleged crime are not complicated or unclear. Rather, the disagreement is over what legal consequences flow from the facts. At this stage of the case the People have shown an apparently legal seizure of apparently untaxed cigarettes which were by law required to be taxed and to bear stamps showing payment, or an arrangement for payment of the tax. At this point in time, therefore, a hearing would serve only to provide another opportunity for legal argument, not needed by the court, rather than clarification of the facts of this policy dispute. The existence of that disagreement does not persuade the court that continued prosecution would be unjust. The defense can and presumably will address these issues at trial. The motion to dismiss the indictment in furtherance of justice is therefore denied.

So ordered.

Enter.

Date: December 11, 2012

Jerome J. Richards

JEROME J. RICHARDS, J.C.C.

# Exhibit E

# SENECA NATION OF INDIANS
# BUSINESS LICENSE

*This permit certifies that*

***Deanna Snyder***

*Has completed all necessary application procedures and is approved to operate as a*

*Tobacco Wholesaler*

**"Seneca Hawk Tobacco Project Wholesale"**

P.O. Box 278
11972 Route 20
Irving, NY 14081

*The named business, having complied with the Seneca Nation's Licensing Ordinance of 2003 is hereby authorized to engage in, or transact business within the jurisdiction of the Seneca Nation of Indians. This may be revoked or withdrawn for violation of, or failure to comply with, any provisions of the above named law(s). This License is non-transferable. If the business changes hands or is discontinued for any reason, this License is null and void for any purpose.*

Diane Kennedy 8/29/12

*Signature SNI Clerk* *Date*

*8/11/2013*
*Expiration Date*

# Exhibit F

At a special term to be held before the Honorable David Demarest, J.S.C., on the 8th day of February, 2013, at St. Lawrence Court Courthouse, 48 Court Street, Canton, New York.

**NEW YORK STATE SUPREME COURT**
**COUNTY OF ST. LAWRENCE**

---

**The Matter of JOHN WATERMAN and IROQUOIS WHOLESALE,**

**Petitioners,**

**against**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHAN BECKER; NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

**Respondents.**

---

**NOTICE OF PETITION**
C.P.L.R. §7804

Index No. _____

ORAL ARGUMENT REQUESTED



**PLEASE TAKE NOTICE** that upon the annexed verified petition, dated December 3, 2012, affirmation and memorandum of law by Paul J. Cambria, Jr., Esq., sworn to on December 3, 2012; the affidavit of John Waterman, sworn to on December 3, 2012; and all attached documentary exhibits regarding this action, the undersigned will move this Honorable Court on Friday, the 8th day of February, 2013, at 9:30 a.m., or as soon thereafter as counsel may be heard, at a term to be held at the NYS Supreme Court, located at St. Lawrence Court

Courthouse, 48 Court Street, Canton, New York, regarding petitioners' application for an Order pursuant to C.P.L.R. Article 78 requiring that the above named respondents be enjoined from selling or disposing of any cigarette products seized from petitioners or any of its agents on August 10, 2012, in St. Lawrence County, New York, and further that respondents be ordered to release and return said items to petitioner, and for such other relief as this Court deems just and proper. Pursuant to C.P.L.R. §7804(c), "[a]n answer and supporting affidavits, if any, shall be served at least five days before" the return date set out above. A reply by petitioners, together with supporting affidavits, if any, "shall be served at least one day before such time."

Dated: Buffalo, New York.
December 3, 2012.

Respectfully submitted,

TIMOTHY P. MURPHY, ESQ.

PAUL J. CAMBRIA, JR., ESQ.
LIPSITZ GREEN SCIME CAMBRIA, LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
Phone: (716) 849-1333
Fax: (716) 855-1580 *(not for service)*
E-mail: pcambria@lglaw.com *(not for service)*
*Attorneys for Petitioner*

TO: HON. NICOLE M. DUVE'
St. Lawrence County District Attorney
48 Court Street
Canton, New York 13617

HON. ERIC T. SCHNEIDERMAN
NYS Attorney General
Regional Office
207 Genesee Street, Room 508
Utica, New York 13501

HON. THOMAS H. MATTOX
NYS Department of Taxation and Finance
W.A. Harriman Campus
Building 5, Room 500
Albany, New York 12227

HON. JOSEPH A. D'AMICO
New York State Police Superintendent
1220 Washington Avenue
Building 22
Albany, New York 12226-2252

NEW YORK STATE SUPREME COURT
COUNTY OF ST. LAWRENCE

---

**The Matter of JOHN WATERMAN and IROQUOIS WHOLESALE,**

**Petitioners,**

**against**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHAN BECKER; NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

**Respondents.**

**VERIFIED PETITION**
C.P.L.R. §7804

---

Petitioners JOHN WATERMAN and IROQUOIS WHOLESALE, hereby petition this Court for an Order pursuant to C.P.L.R. Article 78 requiring that the above named respondents be enjoined from selling or disposing of any cigarette products seized from petitioners or any of its agents on August 10, 2012, in St. Lawrence County, New York, and further that respondents be ordered to release and return said items to petitioner, and for such other relief as this Court deems just and proper. In support of this Petition, it is asserted that:

1. As set out below, as well as in petitioners' affirmation and memorandum of law in support, the cigarettes in question were illegally seized, and are presently being illegally detained by respondents. No warrant was relied upon in seizing and detaining the cigarettes at issue, nor has the government initiated either civil or criminal proceedings regarding the August 10th event.

The instant proceeding, brought pursuant to C.P.L.R. Article 78, is the only remedy at law available for petitioners to litigate this constitutional infringement - - and to obtain back the property seized from them on the date in question. In short, respondents have a legal duty to return petitioners' seized property, and are acting arbitrarily and capriciously, and without legal authority or jurisdiction by not returning said property. *See* C.P.L.R. §§ 7801(1); 7803 (1), (2) and (3).

2. On August 10, 2012, a truck transporting eighty four (84) cases of cigarettes, traveling from the Saint Regis Mohawk Indian ("SRMI") reservation in Akwesasne and Hogansburg, New York, to the Seneca Nation of Indians ("SNI") reservation in Irving, New York, was pulled over on Route 37 in St. Lawrence County. The cigarette contents therein were seized by the New York State Police (hereafter, "NYSP").

3. The bills of lading and purchase orders related to the cigarettes herein (**Exhibit A**) plainly indicate that the items were being transported from one sovereign Indian territory to another. There were two pickups; one from Mohawk Distribution in Akwesasne, and the other from Speedway Wholesale in Hogansburg. Both of these facilities are located on the SRMI reservation.

4. The truck and the contents being transported therein are owned and operated by petitioners, including Iroquois Wholesale (hereafter, "Iroquois"), a company operating out of, and licensed as a cigarette wholesaler by, the SNI in Irving, New York (in Cattaraugus County). *See* **Exhibit B** (SNI Business License, with SNI enclosure letter, dated August 13, 2012).

5. As further set out in the annexed affidavit of Iroquois part owner, petitioner John Waterman (**Exhibit C**), an enrolled member of the SNI, all cigarettes seized on the date in question were Native brands. None of these items would have been stamped at the time of their

pick up at the SRMI reservation, as this procedure would not have occurred until petitioners' truck had returned to its facility back on the SNI reservation in Irving. *See again,* **Exhibit C.**

6. Iroquois is also a licensed SNI stamping agent. *See* **Exhibit D** (SNI stamping agent license for the period of May 20, 2012, through May 9, 2013; with SNI correspondence, dated May 8, 2012).

7. Both the SRMI and the SNI are federally recognized Indian tribes, and are sovereign territories. Both are included under the state definition of "Indian nation or tribe" under NY Tax Law §470(14); and the land they hold are "qualified reservation[s]." NY Tax Law §470(16).

8. The NYSP operating in St. Lawrence County are under Troop B; head quartered in Ray Brook, New York, in Essex County. Upon information and belief, evidence seized by the NYSP under Troop B is stored at its facility in Ray Brook, New York.

9. The NYSP, as a law enforcement agency, acts, after the seizure of suspected evidence in St. Lawrence County, at the direction and advice of the St. Lawrence County District Attorney's Office. St. Lawrence County Assistant District Attorney, Jonathan Becker, has been the prosecutor your deponent has had contact with to this point, with the understanding that Mr. Becker was handling this matter.

10. Upon information and belief, the continued detainment of the cigarettes in question have been, until recently, implemented under the direction of the St. Lawrence District Attorney's Office. However, your deponent has recently learned that the New York State Attorney General's Office has either taken over the investigation, or is in the process of doing same. Your deponent has also received information that the NYS Department of Taxation and Finance (hereafter, the "Taxation Department") is a participant in at least one other pending and

analogous state tax investigation in St. Lawrence County, and may also be participating in the present one. The NYS Attorney General also serves as legal representative of the NYSP and the Taxation Department.

11. To date, the cigarettes in question have not been returned to petitioners. Nor has Iroquois or any of its employees or agents been charged with committing a crime here. Upon information and belief, said cigarettes have remained at all times relevant to this action in the custody and control of the NYSP at the direction of the St. Lawrence District Attorney's Office.

12. As further set out in the annexed affirmation and memorandum in support, sworn to by Paul J. Cambria, Jr., Esq., as well as the annexed affidavit of John Waterman, petitioners have been deprived of their property without specific statutory authority, in violation of its treaty rights and without Due Process of law, by having their cigarettes seized during transport between reservations.

**WHEREFORE**, your deponent respectfully requests that this Court grant petitioners' application herein in its entirety, in that respondents be enjoined from selling or disposing of any cigarette products seized from petitioners or its agents on August 10, 2012, in St. Lawrence County, New York, and further that respondents be ordered to release and return said items to petitioners, and for such other relief as this Court deems just and proper.

Dated: Buffalo, New York
December 3, 2012

**PAUL J. CAMBRIA, JR., ESQ.**

VERIFICATION

I, Paul J. Cambria, Jr., Esq., being duly sworn, deposes and says: I am the attorney for the petitioners in this matter. I have read the foregoing Petition and know the contents thereof. The same is true to my knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters I believe them to be true. This verification is being executed by counsel pursuant to C.P.L.R. 3020(d)(3), based on the disparate residences of petitioner and your deponent.

**PAUL J. CAMBRIA, JR., ESQ.**

Sworn to before me this
3RD day of December, 2012.

Notary Public

TIMOTHY P. MURPHY
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires 5-9-15

NEW YORK STATE SUPREME COURT
COUNTY OF ST. LAWRENCE

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**The Matter of of JOHN WATERMAN and IROQUOIS WHOLESALE,**

**Petitioners,**

**AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT**
C.P.L.R. §7804

**against**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHAN BECKER; NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

**Respondents.**

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STATE OF NEW YORK :
COUNTY OF ERIE : ss
CITY OF BUFFALO :

**PAUL J. CAMBRIA, JR., ESQ.**, pursuant to C.P.L.R. 2106 and subject to the penalties for perjury, duly affirms the following to be true and accurate to the best of my knowledge:

1. I am an attorney at law, duly licensed to practice my profession in this state. I am a senior partner with Lipsitz Green Scime Cambria LLP in Buffalo. We represent the above captioned petitioners in this action.

2. Unless otherwise stated, this Affirmation and Memorandum is made upon information and belief, the source of which is your deponent's examination of my confidential office file, the majority of the documents being related to the events of August 10, 2012, wherein

certain cigarette products belonging to petitioners were seized by the NYS Police. Your deponent's information is also based on his own investigation, including personal conversations with petitioners and their employees.

3. The present application is hereby made under the authority of Civil Procedure Laws and Rules ("C.P.L.R.) Article 78 for a Court order to enjoin the respondents from selling or disposing of any cigarette products seized from petitioners or their agents on August 10, 2012, in St. Lawrence County, New York, and further that respondents be ordered to release and return said items to petitioners, and for such other relief as this Court deems just and proper.

4. As set out below, the cigarettes in question were illegally seized, and are presently being illegally detained by respondents. No warrant was relied upon in seizing and detaining the cigarettes at issue, nor has the government initiated either civil or criminal proceedings regarding the August 10th event. The instant proceeding, brought pursuant to C.P.L.R. Article 78, is the only remedy at law available for petitioners to litigate this constitutional infringement - - and to obtain back the property seized from them on the date in question. HCI Distribution, Inc. v. New York State Police, et al., 36 Misc.3d 743, 747-748 (Sup. Ct., St. Lawrence Co. 2012) (Demarest, J.S.C.) ("Prohibition will not lie if there is an adequate "ordinary" remedy to right the alleged error. [citation omitted] With no criminal prosecution pending, or even a warrant to contest, there is no "ordinary" remedy and this special proceeding pursuant to Article 78 is proper."). In short, respondents have a legal duty to return petitioners' seized property, and are acting arbitrarily and capriciously, and without legal authority or jurisdiction by not returning said property. *See* C.P.L.R. §§ 7801(1); 7803 (1), (2) and (3).

## I.

## Introductory Facts and Identification of Parties

5. Your deponent hereby incorporates by reference all allegations set out in the Petition herein. On August 10, 2012, a truck transporting eighty four (84) cases of cigarettes, traveling from the Saint Regis Mohawk Indian ("SRMI") reservation in Akwesasne and Hogansburg, New York, to the Seneca Nation of Indians ("SNI") reservation in Irving, New York, was pulled over on Route 37 in St. Lawrence County. The cigarette contents therein were seized by the New York State Police (hereafter, "NYSP").

6. The bills of lading and purchase orders related to the cigarettes herein (**Exhibit A**) plainly indicate that the items were being transported from one sovereign Indian territory to another. [1] There were two pickups; one from Mohawk Distribution in Akwesasne, and the other from Speedway Wholesale in Hogansburg. Both of these facilities are located on the SRMI reservation.

7. The truck and the contents being transported therein are owned and operated by petitioners, including Iroquois Wholesale (hereafter, "Iroquois"), a company operating out of, and licensed as a cigarette wholesaler by, the SNI in Irving, New York (in Cattaraugus County). *See* **Exhibit B** (SNI Business License, with SNI enclosure letter, dated August 13, 2012).

8. As further set out in the attached affidavit of Iroquois part owner, petitioner John Waterman (**Exhibit C**), an enrolled member of the SNI, all cigarettes seized on the date in question were Native brands. None of these items would have been stamped at the time of their

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[1] *See again* HCI Distribution, Inc., 36 Misc.3d at 750 (this Court considering bill of lading to be sufficient evidence of out-of-state delivery for Article 78 purposes).

pick up at the SRMI reservation, as this procedure would not have occurred until petitioners' truck had returned to its facility back on the SNI reservation in Irving. *See again,* **Exhibit C.** [2]

9. Iroquois is also a licensed SNI stamping agent. *See* **Exhibit D** (SNI stamping agent license for the period of May 20, 2012, through May 9, 2013; with SNI correspondence, dated May 8, 2012).

10. Both the SRMI and the SNI are federally recognized Indian tribes, and are sovereign territories. Both are included under the state definition of "Indian nation or tribe" under NY Tax Law §470(14); and the land they hold are "qualified reservation[s]." NY Tax Law §470(16).

11. The NYSP operating in St. Lawrence County are under Troop B; head quartered in Ray Brook, New York, in Essex County. Upon information and belief, evidence seized by the NYSP under Troop B is stored at its facility in Ray Brook, New York.

12. The NYSP, as a law enforcement agency, acts, after the seizure of suspected evidence in St. Lawrence County, at the direction and advice of the St. Lawrence County District Attorney's Office. St. Lawrence County Assistant District Attorney, Jonathan Becker, has been the prosecutor your deponent has had contact with to this point, with the understanding that Mr. Becker was handling this matter.

13. Upon information and belief, the continued detainment of the cigarettes in question have been, until recently, implemented under the direction of the St. Lawrence District Attorney's Office. However, your deponent has recently learned that the New York State Attorney General's Office has either taken over the investigation, or is in the process of doing

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[2] This is no different from any other cigarette delivery traveling from the manufacturer to the stamping agent; as it is not the manufacturer that does the stamping; the items must travel from "point A" to "point B" before they are stamped.

same. Your deponent has also received information that the NYS Department of Taxation and Finance (hereafter, the "Taxation Department") is a participant in at least one other pending and analogous state tax investigation in St. Lawrence County, and may also be participating in the present one. The NYS Attorney General also serves as legal representative of the NYSP and the Taxation Department.

14. To date, the cigarettes in question have not been returned to petitioners. Nor has Iroquois or any of its employees or agents been charged with committing a crime here. Upon information and belief, said cigarettes have remained at all times relevant to this action in the custody and control of the NYSP at the direction of the St. Lawrence District Attorney's Office.

## II.

## Argument for the Release and Return of the Cigarettes

15. As this Court has recognized, "[t]he extraordinary remedy of prohibition lies only where there is a clear legal right and only where a quasi-judicial officer, such as a public prosecutor, acts without jurisdiction in a matter over which she has no power over the subject matter, the allegations of the Petition, if established, would support such relief." HCI Distribution, Inc., 36 Misc.3d at 546, citing Matter of B.T. Productions, Inc. v. Barr, 44 N.Y.2d 226, 231-232 (1978). As set out herein, petitioners meet this standard.

### A. NYS Law in General

16. NYS collects cigarette taxes through licensed agents who purchase stamps and affix them to cigarette packs in advance of the first sale within the state.[3] In other words, the whole sellers are "stamping agents" that pre-pay cigarette taxes. "The full amount of the tax is

[3] Since 1939, New York has imposed sales taxes on cigarettes sold in our state. *See* Cayuga Indian Nation v. Gould, 14 N.Y.3d 614, 622 (2010) (explaining state's tax history).

part of the price of stamped cigarettes at all subsequent stops in the distribution stream." Dep't of Taxation v. Milhelm Attea & Bros., 512 U.S. 61, 64 (1994). Therefore, the "ultimate incidence of and liability for the tax [is] upon the consumer." NY Tax Law §471(2).[4]

17. With certain exceptions, cigarettes possessed in New York State, by someone other than a licensed NYS stamping agent or wholesaler, must have a NYS stamp. NY Tax Law §471, *et seq.* In New York, "cigarettes are presumed taxable" until the contrary is proven by those "in possession thereof." City of New York v. Milhelm Attea & Bros., Inc., supra at 337. *See also* 20 N.Y.C.R.R. 74.1(a)(1).

18. But while no person other than a duly licensed NYS agent may possess or transport, for the purpose of sale, any unstamped cigarette packages (*see* NY Tax Law §1814),[5] cigarettes possessed in NYS are not to be taxed where NYS is "without power" to tax. NY Tax Law §471(1). Indeed, "New York State lacks authority to tax cigarettes sold to tribal members for their own consumption..." Milhelm Attea, et al., 512 U.S. at 64, citing Moe v. Confederated Salish and Kootenai Tribes, et al., 425 U.S. 463, 475-481 (1976).[6] Accordingly, "cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped." Milhelm Attea, et al., 512 U.S. at 64.[7]

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[4] Put another way, "[t]axes [in NYS] are largely collected through a system of pre-payments, and then passed along the distribution chain to the consumer." City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 337 (E.D.N.Y. 2008) (internal citations omitted).

[5] Excluded from this definition, applicable at bar, is the "temporary incidental possession of employees or agents of persons lawfully entitled to possession." *See* NY Tax Law §1814(e).

[6] *See also* City of New York, 550 F. Supp. 2d at 337.

[7] "On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to taxation." Milhelm Attea, et al., 512 U.S. at 64 (internal citation omitted); Moe, 425 U.S. at 483 (approving for first time the taxing of non-tribal members on reservation); *see also* United States v. Kaid, 241 Fed. Appx. 747, 750 (2d Cir. 2007). In the late 1980's NYS began clamping down on the large volume of untaxed cigarettes in the state. To ensure that non exempt cigarettes do not escape taxation, NYS has limited the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal members.

B. Transportation Between Reservations: No Specific Statutory Provision, Treaty and Due Process Violations

19. NY Tax Law §471(1) states that all cigarettes "possessed in the state by any person for sale" must be taxed. The statute does not apply, however, to goods *not* sold within New York State. *See* 20 N.Y.C.R.R. 74.6(a)(1) ("all cigarettes possessed in New York State by any person *for sale in the State* are subject to the tax imposed by article 20 of the Tax Law") (emphasis added). When cigarettes are merely transported between Indian reservations, they must travel *through* the state, but are not subject to seizure for being unstamped, as there is no specific provision addressing this scenario. [8]

20. As the Supreme Court has long recognized, "Indian Tribes retain their original natural rights, which vested in them as sovereign entities long before the genesis of the United

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Though the propriety of New York's 1988 regulations implementing the state's policy of keeping non-tribal members from obtaining tax-free cigarettes from the reservations was upheld by the Supreme Court (*see* Milhelm Attea, et al., 512 U.S. at 61), the regulations were never implemented. Gould, 14 N.Y.3d at 623-624. In fact, Governor Pataki repealed them in 1998. The Taxation Department adopted new regulations on taxing cigarette sales to non-Indians on Indian reservations on October 22, 2010. This was codified at 20 N.Y.C.R.R. 74.6, and approved in Seneca Nation of Indians v. State of New York, 89 A.D.3d 1536 (4th Dep't 2011), *appeal denied,* (February 21, 2012). Under New York's regulations implementing NY Tax Law Art. 471, retailers may participate in a coupon system, which would permit them to receive their allotment of tax-exempt cigarettes (20 NYCRR 74.6[a][4]); or otherwise retailers may participate in a "prior approval" system. *See* 20 N.Y.C.R.R. 74.6(a)(5); NY Tax Law §471(5).

[8] The seizure at bar even arguably violates NY Indian Law §15, which states that "[t]he Indians of the Six Nations *may pass and repass free of toll and ferriage*, at all seasonable times of the day, on any turnpike road, which shall have been established since April sixth, eighteen hundred and three, or which shall hereafter be established, leading from or through the town of Canandaigua to Buffalo creek or its vicinity, and over any toll bridge between those places, and at the ferry across the Niagara river at or near Black Rock, or at such place or places in its vicinity where any ferry shall have been established since such time, or shall hereafter be established." (emphasis added) Though the Attorney General has opined that NY Indian Law §15 does not apply to the NYS Thruway (*see* 1958 NY Ops Atty Gen May 23), upon information and belief, Route 37, where the seizure occurred, is not part of the Thruway system. Further, although NY Tax Law §471(1) indicates that "[t]he tax imposed by this section is imposed on all cigarettes sold on an Indian reservation to nonmembers of the Indian reservation or tribe and to non-Indians and evidence of such tax shall be made by means of an affixed cigarette stamp," there is no provision specifically addressing the stamping requirements for the "pass through" situation; where cigarettes are transported directly between Indian reservations. *See also* 20 N.Y.C.R.R. §§ 70.2(d); 74.5.

States." Worcester v. Georgia, 31 U.S. 515, 519 (1832). The government lacks the authority to abrogate the sovereign rights of the SNI and its members without express, clear and unequivocal legislative expression to in fact do so. As a leading scholar on Indian law has stated it, "[t]he basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." *See* Felix S. Cohen, Handbook of Federal Indian Law, Matthew Bender & Co., Inc. (Lexis), 2012, §2.02[1] (internal citations omitted). Further, state involvement, as opposed to federal jurisdiction, is limited in the area of Indian affairs. *See again* Cohen, supra at §6.01[1]. Moreover,

> **Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.** Although no longer "possessed of the full attributes of sovereignty," they remain a **"separate people, with the power of regulating their internal and social relations." They have power to make their own substantive law in internal matters.**
>
> **As separate sovereigns pre-existing the Constitution**, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.
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> * * *
>
> As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-57 (1978) (emphasis added and extensive citations omitted).[9] So while the government may under certain circumstances have the ultimate

[9] *See also* Id. at 71 ("we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. *See* Elk v. Wilkins, 112 U.S. 94 [1884]"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148, n14 (1982) (in upholding a Tribe's sovereign authority to

word, that word must be clear and unequivocal. As noted above, the NY Tax Law does not specifically address the situation at bar.

21. Moreover, even if clear legislative language existed to govern petitioners' conduct at bar, an Indian Tribe's treaty rights must still be respected. In discussing its "unique Indian tax immunity jurisprudence," the U.S. Supreme Court has recognized,

> "the doctrine of tribal sovereignty . . . [ ] historically gave state law 'no role to play' within a tribe's territorial boundaries." *Oklahoma Tax Comm'n* v. *Sac and Fox Nation,* 508 U.S. 114, 123-124, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993) (quoting *McClanahan* v. *Arizona Tax Comm'n,* 411 U.S. 164, 168, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973)). We have further explained that the doctrine of tribal sovereignty, which has a "significant geographical component," *Bracker, supra,* at 151, 100 S. Ct. 2578, 65 L. Ed. 2d 665, requires us to "revers[e]" the "'general rule'" that "'exemptions from tax laws should . . . be clearly expressed.'" *Sac and Fox, supra,* at 124, 113 S. Ct. 1985, 124 L Ed. 2d 30 (quoting *McClanahan, supra,* at 176, 93 S. Ct. 1257, 36 L. Ed. 2d 129). **And we have determined that the geographical component of tribal sovereignty "'provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'"** *Sac and Fox, supra,* at 124, 113 S. Ct. 1985, 124 L Ed. 2d 30 (quoting *McClanahan, supra,* at 172, 93 S. Ct. 1257, 36 L. Ed. 2d 129).

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 112 (2005) (emphasis added). Not permitting the petitioners to simply transport cigarettes between reservations effectively violates the tribal sovereignty of the SNI, and their freedom to carry on commerce with other tribal communities; a protection the SNI seeks to furnish its members with, including petitioners.

22. Aside from the basic sovereignty principles recognized by the Supreme Court, the seizure and continued detainment of the cigarettes at bar constitutes a violation of the 1794 Treaty of Canandaigua (7 Stat. 44 [1794]), which was executed by the federal government and

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impose of a severance tax on natural resources removed by nonmembers from tribal land; the court noted that "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence [in the Tribe's constitution] on this point is that the sovereign power to tax remains in tact").

the Six Nations of the Iroquois Confederacy and encompasses the SNI. Here is the pertinent text of the treaty, which incorporates our state government's agreements with the Tribes:

> The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of **removing from their minds all causes of complaint**, and establishing a firm and permanent friendship with them...
>
> ARTICLE 2. **The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in <u>their respective treaties with the State of New York,</u>**
>
> and called their reservations, to be their property; and **the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them <u>in the free use and enjoyment thereof</u>**; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.
>
> ARTICLE 3. *[Geographic boundaries of the treaty are described here]* Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and **the United States will never** claim the same, nor **disturb** the Seneca Nation, nor **any of the Six Nations, or of their Indian friends residing thereon, and united with them, <u>in the free use and enjoyment thereof</u>**; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the
>
> ARTICLE 4. **The United States** have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and **engaged never to** claim the same, not **disturb** them, or **any of the Six Nations, or their Indian friends residing thereon, and united with them, <u>in the free use and enjoyment thereof</u>**; now, the Six Nations, and each of them, hereby engage that they will never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.
>
> (emphasis added)

The seizure and detainment of Iroquois' property has effectively precluded petitioners from exercising "the free use and enjoyment" of their land,[10] as there is no way for Iroquois to do business with other Indian Tribes without crossing (or passing through) non-reservation New York State land. Moreover, at least one scholar has recognized the signers of the 1794 Treaty as anticipating the Tribes *leaving* the land in order to use the land, as noted by the Third Circuit:

> Robert Venables, Ph.D., a Senior Lecturer in the American Indian Program at Cornell University, also testified concerning the Haudenosaunee understanding of the treaty. He indicated that the treaty was the result of negotiations which began in 1789 and stated his opinion that at that time the Haudenosaunee were interested in maintaining their position of Independence from pre- to post-revolutionary America. He testified that the United States' motive in entering into the treaty was to secure peace with the Haudenosaunee because it feared that they might join forces with the Indians against whom it was warring in Ohio, Indiana and Michigan. Had the Haudenosaunee joined the war, the war zone would have increased to include the heart of New York and Pennsylvania. Mr. Venables concluded that because the Haudenosaunee believed the treaty to have allowed them to remain a separate political entity, they would have understood it to have prevented the United States from taxing them in any manner. A report submitted to the trial court by Mr. Venables further concludes that **the treaty implicitly accepted the right of the Haudenosaunee to leave their lands to earn a living, as this was their accepted practice before the treaty and that they therefore should not be taxed for doing so.**

Lazore v. Commissioner, 11 F.3d 1180, 1186 (3d Cir. 1993) (emphasis added). The respondent's conduct here in seizing petitioners' property as they attempted to conduct their lawful business was thus illegal. [11]

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[10] *See* Cook v. United States, 86 F.3d 1095, 1097-1098 (Fed. Cir. 1996) (finding that the 1794 treaty applied to the use of the Tribe's land).

[11] Further, the "Ninth" Article of the Treaty of May 20, 1842 (7 Stat. 586 [1842], otherwise known as the "Buffalo Creek Treaty") between the Seneca People and the United States requires the United States to protect the territories of the SNI and the Seneca People from "all taxes, and the assessment for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the

23. Indian treaties are deemed the legal equivalent of federal statutes (Solis v. Matheson, 563 F.3d 425, 430 [9th Cir. 2009]), and if silent as to their applicability to Indian tribes, statutes will not be interpreted to violate rights guaranteed by Indian treaties. U.S. v. Fiander, 547 F.3d 1036, 1039 (9th Cir. 2008). Since the warrantless seizure of Iroquois' property violates the Treaty of Canandaigua and the Buffalo Creek Treaty, and the NY Tax Law does not specifically address the present scenario, respondents' conduct at bar is illegal.

24. Furthermore, as the Second Circuit has recognized, "due process requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." Red Earth v. United States, 657 F.3d 138, 143 (2d Cir. 2011), *citing* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-345 (1954); *contrast* Quill Corp. v. North Dakota, 504 U.S. 138, 144 (1992) (where party purposefully directed its activities at the residents of the state and engaged in continuous widespread solicitation of business; contacts were sufficient for due process purposes). The Red Earth court also expressed skepticism that a *single* isolated sale would be sufficient for due process purposes. Red Earth, 657 F.3d at 145.[12] Accordingly, our state and federal Due Process clauses (N.Y. Const., Art. I, §6; U.S. Const., Amends. V and XIV) prohibit the government from seizing (and now detaining) the petitioners' property under the

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possession thereof shall have been relinquished by them." This Treaty is also violated by the respondents' actions at bar.

[12] *See also* City of New York v. Milhelm Attea & Bros., 2012 U.S. Dist. LEXIS 11653, at *92, fn 11 (E.D.N.Y. 2012) (noting the Red Earth court's Due process ruling). Further, though NY Tax Law §471(2) and 20 NYCRR 74.6(a)(3) indicate that "[a]ll cigarettes sold by agents and wholesalers **to** Indian nations or tribes or reservation cigarette sellers located on Indian reservation must bear a tax stamp" (emphasis added), this provision does not address the matter at bar where the cigarettes are transported **between** reservations. These statutes, of course, are to be interpreted liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

circumstances at bar; as petitioners were merely transporting their cigarettes (pursuant to two purchase orders [*see again* **Exhibit A**]) between Indian reservations. [13]

25. Iroquois has thus been deprived of its property without specific statutory authority, in violation of its treaty rights and without Due Process of law, by having its cigarettes seized during transport between reservations.

C. The State Has Limited Authority to Regulate Tax Transactions Derived From Value Generated on Indian Reservations

26. Because of the importance of the historical and cultural nature of Indian sovereignty and the federal government's interests therein, there is (as noted above) a general presumption that state law does not apply within Indian County when only Indians are at issue. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980). Aside from the federal government's interests pre-empting this area, one danger is that state regulation may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." Bracker, 448 U.S. at 142, citing Williams v. Lee, 358 U.S. 217, 220 (1959). As the Supreme Court has opined,

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that

[13] Once the court determines that no tax may be imposed on the cigarettes, the fact that there may be "some possibility that [the cigarettes] might be re-introduced into New York and subject to taxation cannot provide a basis for seizure." HCI Distribution, Inc., 36 Misc.3d at 749-750 ("Respondents rely on only pure speculation that the products seized here would be re-introduced into this state. Statements made to Respondents by the driver about past deliveries and information from the Petitioner's website are not sufficient to support the confiscation of private property without a warrant or the initiation of a criminal or civil proceeding.").

> have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Bracker, 448 U.S. at 144-145 (emphasis added and internal citations omitted). Seizing petitioner's property at bar, which was only being transported *between* reservations, directly infringed on Indian-to-Indian commerce on Indian lands.

27. Considering the Bracker balancing analysis here, the federal government, of course, has a long recognized interest in the Tribes' economic development and protecting the Tribes' self sufficiency. Bracker, 448 U.S. at 143-144.[14] Moreover, the Tribe here (SNI) has a significant and direct interest in the revenue that is generated by petitioners paying for stamping and wholesaler licenses, which generate funds for SNI members' services, as well as the employment that results from petitioners' business on the SNI reservation. New York State, on the other hand, is attempting to reach into an Indian on Indian transaction for a benefit where the State had no previous involvement. Indeed, where a product is created, sold and consumed without State involvement, the State's interests should be considered minimal. [15] Indeed, the

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[14] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-219 (1987) (though superseded by 1988 Indian Gaming Regulatory Act, *see* KG Urban Enters., LLC v. Patrick, 693 F.3d 1, 7 [1st Cir. 2012], principles addressed above remain in tact); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) ("The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but also would threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members."); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156-157 (1980) ("While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services").

[15] *See generally* Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 987 (10th Cir. 1987) (state precluded from regulating Tribe's bingo operations).

burden on the petitioners in having their property seized, and ultimately taxed, is substantial, and constitutes a significant and unwarranted mountain to climb in the running of their business.

28. New York States' actions here have thus infringed upon the right of the SNI to make its own laws, as the State is attempting to regulate transactions derived from value generated on Indian lands.

D. The State Government's Intent

29. Moreover, our state government has expressed an intention not to seize and (or) prosecute for any violations of law under the circumstances of the present case. On July 6, 2011, Richard Ernst of the Taxation Department, e-mailed the Criminal Investigation Division ("CID") of the Taxation Department, setting out particular scenarios where untaxed and unstamped cigarettes in New York should not be seized. This e-mail (**Exhibit E**) instructed CID investigators not to seize shipments from Native Americans, where the transport is from one reservation to another within the state, or between a NYS reservation and an out of state reservation.

30. Further, on May 16, 2011, a joint letter written by State Senators George D. Maziarz and Timothy M. Kennedy to the Commissioner of the Taxation Department (**Exhibit F**), indicated that:

> "In reading these [tax related] regulations, it is clear that the issue of the sale of native Brand cigarettes and tobacco products, which are produced on Native territories, are not addressed... There is currently no process in place to stamp Native cigarettes in order to effectuate sales tax collection... It is our view that Native Brand cigarettes... cannot be regulated or taxed by the State of New York... [T]he state should not pursue an effort to collect taxes on Native Brands because such an effort would be contrary to the sovereign rights of the Native Nations..."

As set out in the attached affidavit from Iroquois part owner, John Waterman (*again,* **Exhibit C**), the cigarettes seized at bar were all Native brands. It thus violates basic notions of Due Process for the State to seize property to purportedly enforce a statutory scheme without specific regulations in place to provide proper notice and instruction. [16]

**WHEREFORE**, your deponent respectfully requests that this Court grant petitioners' application herein in its entirety, in that respondents be enjoined from selling or disposing of any cigarette products seized from petitioners or its agents on August 10, 2012, in St. Lawrence County, New York, and further that respondents be ordered to release and return said items to petitioners, and for such other relief as this Court deems just and proper.

Dated: Buffalo, New York
December 3, 2012

**PAUL J. CAMBRIA, JR., ESQ.**

[16] The Taxation Department's regulations on taxing cigarette sales to non-Indians on Indian reservations (*see* FN 5 above), codified at 20 NYCRR 74.6, did not specifically address the issue raised by Senators Maziarz and Kennedy here. Enforcement herein further violates Court of Appeals precedent "requiring an appropriate legislative or regulatory scheme" regarding the implementation of Tax Law §471 "as the sole basis to sanction Nation retailers for alleged noncompliance" with the law. *See* Gould, 14 N.Y.3d at 653 (addressing the lack of regulation regarding the calculation and collection of cigarette sales taxes that distinguishes between federally exempt retail sales to Indians occurring on a "qualified reservation" and non-exempt sales to other consumers).

# Exhibit
# A

MOHAWK DISTRIBUTION LLC

# Bill of Lading

| Date | Page |
|---|---|
| Aug 10, 2012 | 1 |

**Sold To:**
Iroquois Wholesale
11157 Old Lakeshore Rd
Cattaraugus Nation
Irving, NY 14081

**Ship To:**
Iroquois Wholesale
11157 Old Lakeshore Rd
Cattaraugus Nation
Irving, NY

| Order No. | Order Date | Cust. No. | Salesperson | PO Number | Ship Via | Terms |
|---|---|---|---|---|---|---|
| ORD05628 | Aug 10, 2012 | MDLLC 307 | | 2576 | | |

**Condition of Sale:**
These goods were sold to the buyer who took title to these goods on the Akwesasne Mohawk Soveraign Territory for delivery only to the buyer on the Sovereign Indian Territory stated above.

| Qty Ord | Qty Shp | UOM | Item Number | Description |
|---|---|---|---|---|
| 1,020 | 1,020 | Carton | 693067472004 | Signal FF KS BOX |
| 1,020 | 1,020 | Carton | 693067472103 | Signal FF 100 BOX |
| 600 | 600 | Carton | 693067472028 | Signal SMOOTH KS BOX |
| 720 | 720 | Carton | 693067472127 | Signal SMOOTH 100 BOX |
| 420 | 420 | Carton | 693067472134 | Signal MEN 100 BOX |

Total Pcs 3780.00

**Driver's License #** **Plate #**

Aug 13 12 03:17p SPEEDWAY WHOLESALE/SMOKEY 1-518-358-2219 p.1

Original — Not Negotiable

# STRAIGHT BILL OF LADING

SHORT FORM

Carrier's Pro No. _____
Shipper's Bill of Lading No. _____
Consignee's Reference/PO No. _____
Carrier's Code (SCAC) _____

(Name of Carrier)

RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request,
at Aug 13 2012 From Speedway Wholesale

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination. If on its route, otherwise to deliver to another carrier on the route to said destination. It is hereby agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classification in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to ERW Iroquois Wholesale

Destination 1157 old Lakeshore Rd Irving State NY Zip 14081 County _____

(Mail or street address of consignee—For purposes of notification only.)
Delivery Address *: _____

* To be filled in only when shipper desires and governing tariffs provide for delivery thereof.

Route _____

Delivering Carrier _____ Car or Vehicle Initials _____ No. _____

| No. Packages | Kind of Package, Description of Articles, Special Marks, and Exceptions | *Weight (Subject to Correction) | Class or Rate | Check Column |
|---|---|---|---|---|
| 21 | Natives | 840 | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Subject to Section 7 of Conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignee shall sign the following statement.
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

Freight charges are PREPAID unless marked collect. CHECK BOX IF COLLECT ☐

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

Charges Advanced: $ _____

[Shipper's imprint in lieu of stamp; not a part of Bill of Lading approved by the Interstate Commerce Commission.

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading state whether it is carrier's or shipper's weight.
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

Liability Limitation for loss or damage on this shipment may be applicable. See 49 U.S.C. § 14706(c)(1)(A) and (B).

The fibre boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of the Consolidated Freight Classification.

Shipper, Per _____ Agent, Per _____

Permanent post-office address of shipper _____

1

REDIFORM. Carbonless Speedlist® Forms Rediform, Inc. Made in U.S.A.

44-301•Triplicate
44-302•Quadruplicate

IROQUOIS WHOLESALE

SOVEREIGN SENECA TERRITORY
11157 OLD LAKESHORE RD
IRVING, NY 14081

Phone # 716-934-3160 jsanborn@erwenterprises.net
Fax # 716-934-3177

# Purchase Order

| DATE | P.O # |
|---|---|
| 8/10/2012 | 2576 |

| VENDOR |
|---|
| MOHAWK DISTRIBUTION*<br>320 STATE RT. 37<br>AKWESASNE, NY 13655 |

| SHIP TO |
|---|
| IROQUOIS WHOLESALE<br>SOVEREIGN SENECA<br>NATION TERRITORY<br>11157 OLD LAKESHORE RD<br>IRVING, NY 14081 |

| DUE DATE |
|---|
| 8/10/2012 |

| ITEM | QTY | DESCRIPTION | RATE | AMOUNT |
|---|---|---|---|---|
| 3158 | 1,020 | SIGNAL FF KG BOX | 15.50 | 15,810.00 |
| 3159 | 1,020 | SIGNAL FF 100 BOX | 15.50 | 15,810.00 |
| 3160 | 600 | SIGNAL SMOOTH BOX | 15.50 | 9,300.00 |
| 3161 | 720 | SIGNAL SMOOTH 100 BOX | 15.50 | 11,160.00 |
| 3165 | 420 | SIGNAL MN 100 BOX | 15.50 | 6,510.00 |

**Total** $58,590.00

163 cases.
Pickup vnl# 5426790
X:

IROQUOIS WHOLESALE

SOVEREIGN SENECA TERRITORY
11157 OLD LAKESHORE RD
IRVING, NY 14081

Phone # 716-934-3160
Fax # 716-934-3177
jsanbom@erwenterprises.net

# Purchase Order

| DATE | P.O # |
|---|---|
| 8/10/2012 | 2577 |

| VENDOR |
|---|
| SPEEDWAY WHOLESALE<br>935 STATE ROUTE 37<br>HOGANSBURG, NY 13662 |

| SHIP TO |
|---|
| IROQUOIS WHOLESALE<br>SOVEREIGN SENECA<br>NATION TERRITORY<br>11157 OLD LAKESHORE RD<br>IRVING, NY 14081 |

| DUE DATE |
|---|
| 8/10/2012 |

| ITEM | QTY | DESCRIPTION | RATE | AMOUNT |
|---|---|---|---|---|
| 159 | 600 | NATIVE LT 100 BX | 15.50 | 9,300.00 |
| 163 | 480 | NATIVE ULT LT 100 BX | 15.50 | 7,440.00 |
| 164 | 180 | NATIVE ULT LT 100 SP | 15.50 | 2,790.00 |

**Total** $19,530.00

21 Cases
Pick up
Slip # 54267902
money from Fri - 8:20 AM to 8:40 AM

MOHAWK DISTRIBUTION LLC
320 State Route 37
PO Box 508
Hogansburg, NY, 13655
Phone: (518) 358-9362

# Invoice

| Date | Page |
|---|---|
| Aug 10, 2012 | 1 |

**Invoice Number** IN005527

**Due Date** Aug 10, 2012

**Sold To:**

Iroquois Wholesale
11157 Old Lakeshore Rd
Cattaraugus Nation

**Ship To:**

Iroquois Wholesale
11157 Old Lakeshore Rd
Cattaraugus Nation

| Order No. | Order Date | Cust. No. | Salesperson | PO Number | Ship Via | Terms |
|---|---|---|---|---|---|---|
| ORD05628 | Aug 10, 2012 | MDLLC 307 | | 2576 | | NETDUE |

**Condition of Sale:**

These goods were sold to the buyer who took title to these goods on the Akwesasne Mohawk Soverelgn Territory for delivery only to the buyer on the Soverelgn Indian Territory stated above.

| Qty Ord | Qty Shp | Item Number | Description | Unit Price | UOM | Extended Price |
|---|---|---|---|---|---|---|
| 1,020 | 1,020 | 693067472004 | Signal FF KS BOX | 15.50 | Carton | 15,810.00 |
| 1,020 | 1,020 | 693067472103 | Signal FF 100 BOX | 15.50 | Carton | 15,810.00 |
| 600 | 600 | 693067472028 | Signal SMOOTH KS BOX | 15.50 | Carton | 9,300.00 |
| 720 | 720 | 693067472127 | Signal SMOOTH 100 BOX | 15.50 | Carton | 11,160.00 |
| 420 | 420 | 693067472134 | Signal MEN 100 BOX | 15.50 | Carton | 6,510.00 |

RECEIVED BY: _____

MD Signature: _____

DATE: _____

PAID: _____

| | |
|---|---|
| Subtotal | 58,590.00 |
| Less payment | 0.00 |
| Less pmt. disc | 0.00 |
| Amount due | 58,590.00 |

# Exhibit
# B

# THE SENECA NATION OF INDIANS

90 Ohi:yo' Way
Allegany Territory
Seneca Nation
Salamanca 14779
Phone (716) 945-1790
Fax (716) 945-1565

*PRESIDENT*
*Robert Odawi Porter*

*TREASURER*
*Bradley G. John*

*CLERK*
*Diane Kennedy Murth*

12837 Route 438
Cattaraugus Territory
Seneca Nation
Irving 14081
Phone (716) 532-4900
Fax (716) 532-6272


August 13, 2012

To Whom it may concern

Re: John Waterman, Iroquois Wholesale

Please be advised that Mr. John Waterman of Iroquois Wholesale holds a valid Seneca Nation Business License as a Tobacco Wholesaler. As of this date Mr. Waterman is in good standing with the Business Permits Office.

Please feel free to call my office at (716) 532-4900 ext 5030 with any questions or concerns that may be arise in this matter.

Sincerely,

Geraldine Huff, Deputy Clerk
Seneca Nation of Indians

# SENECA NATION OF INDIANS
# BUSINESS LICENSE

*This permit certifies that*

*John Waterman*

*Has completed all necessary application procedures and is approved to operate as a*

*Tobacco Wholesaler*

**"Iroquois Wholesale"**

11157 Old Lake Shore Road.

Irving, NY 14081

*The named business, having complied with the Seneca Nation's Licensing Ordinance of 2003 is hereby authorized to engage in, or transact business within the jurisdiction of the Seneca Nation of Indians. This may be revoked or withdrawn for violation of, or failure to comply with, any provisions of the above named law(s). This License is non-transferable. If the business changes hands or is discontinued for any reason, this License is null and void for any purpose.*

Diane Kennedy

*Signature SNI Clerk* *Date*

*8/10/2013*

*Expiration Date*

# SENECA NATION OF INDIANS
# BUSINESS LICENSE

*This permit certifies that*

*John Waterman*

*Has completed all necessary application procedures and is approved to operate as a*

*Tobacco Wholesaler*

**"Iroquois Wholesale"**

11157 Old Lake Shore Road

Irving, NY 14081

*The named business, having complied with the Seneca Nation's Licensing Ordinance of 2003, is hereby authorized to engage in, or transact business within the jurisdiction of the Seneca Nation of Indians. This may be revoked or withdrawn for violation of, or failure to comply with, any provisions of the above named law(s). This License is non-transferable. If the business changes hands or is discontinued for any reason, this License is null and void for any purpose.*

Diane Kennedy Murch

*Signature SNI Clerk* *Date*

*8/10/2012*

*Expiration Date*

# Exhibit C

NEW YORK STATE SUPREME COURT
COUNTY OF ST. LAWRENCE

---

**The Matter of JOHN WATERMAN and IROQUOIS WHOLESALE,**

**Petitioners,**

**AFFIDAVIT IN SUPPORT**
C.P.L.R. §7804

**against**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHON BECKER; NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

**Respondents.**

---

STATE OF NEW YORK :
COUNTY OF CATTARAUGUS : ss
:

I, **JOHN WATERMAN**, being duly sworn, deposes and says:

1. I am a petitioner in this action, an enrolled member of the Seneca Nation of Indians ("SNI") and part owner of Iroquois Wholesale ("Iroquois"), a company licensed to conduct business as a cigarette wholesaler and cigarette stamping agent under the laws of the SNI. Our administrative office is located in Irving, New York, in Cattaraugus County. My role with the company includes filing administrative applications for licenses for the company. I have personal knowledge over the record keeping and filing procedures of Iroquois.

2. I have personally reviewed the Petition, the Affirmation and Memorandum of Law and the exhibits attached to attorney Paul J. Cambria, Jr.'s Petition and Affirmation. The bills of lading and purchase orders indicate that the cigarettes being transported on August 10, 2012, were all Native brands picked up from one Indian reservation (Saint Regis Mohawk Indian reservation); set to be transported *directly* to another Indian reservation (i.e., the SNI). (As set out in **Exhibit A** to the Petition, there is a "seal" number [#5426790] handwritten at the bottom of the bills of lading. This "seal" number indicates that the delivery would not be "unsealed" [i.e., sold] before it reached the SNI reservation.) These items would not have been stamped upon pick up, but would have eventually been stamped by our company, once they were received at our Irving facility.

3. The cigarettes being transported on the date in question are the property of Iroquois. The truck driver compelled by the police to turn over the cigarettes he was transporting was acting on behalf of Iroquois. The government was not given permission to seize the cigarettes in question on August 10, 2012. The cigarettes are our property, and we are requesting that they be returned to us.

4. Iroquois is required to transport cigarettes between Indian reservations in order to carry on its business as a wholesaler. The government seizing our cigarettes en route to our carrying out a lawful transaction with parties on another Indian reservation causes a direct and substantial impediment to our business operations.

JOHN WATERMAN

Sworn to before me this
4th day of December, 2012.

Notary Public

TIMOTHY P. MURPHY
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires 5-19-15

# Exhibit
# D

# Seneca Nation of Indians

## Import-Export Commission

Street Address:
252 Rochester St.
Salamanca, NY 14779

Phone (716) 945-1005

Mailing Address:
P.O. Box 231
Salamanca, NY 14779

Fax (716) 945-1624

May 8, 2012

Dear Mr. John Waterman:

Your application to renew your license as a stamping agent of the Seneca Nation has been approved by the Import-Export Commission and the Seneca Nation Council.

At its regular meeting held on April 14, 2012, the Council approved renewal for the one-year period of May 10, 2012 - May 9, 2013.
CN:R-04-14-12-13

Attached you will find your new Certificate of License. Please post your updated stamping agent license in your place of business.

Sincerely,

Jessica Colburn
Import-Export Director

cc: File

# SENECA NATION OF INDIANS
# STAMPING AGENT LICENSE

*This permit certifies that the entity listed below has completed all necessary application procedures and is approved to operate as a*

***Licensed Stamping Agent***

**"John Waterman d/b/a – Iroquois Wholesale"**
11157 Old Lakeshore Road
Irving, NY 14081

**STAMPING LICENSE NUMBER: IEC-020**

**ISSUED BY:** *Seneca Nation Import-Export Commission*
**ON THIS: 20th *DAY OF MARCH, 2012***

*The named business, having complied with the relevant provisions of the Seneca Nation's Import Export Law is hereby authorized to affix Seneca Nation Import Export stamps. This license may be revoked or withdrawn for violation of, or failure to comply with, any provisions of the above named law(s).*
*This License is non-transferable. If the business changes hands or is discontinued for any reason, this License is null and void for any purpose.*

Jessica Colburn, Executive Director — Date: 5/8/12

Diane Kennedy-Murth, SNI Clerk — Date: 5/8/12

**EXPIRATION DATE: MAY 9, 2013**

This Original License must be displayed at your **STAMPING FACILITY** in full view of any Stamping Inspector and/or Commissioner. Each individual Facility must have its own separate license.

# Exhibit
# E

From: Peter ersampieri/ENFORCEMENT/NYSTAX
To: CID Investigators; CID Supervisors

Date: Wednesday, July 06, 2011 09:41AM
Subject: Fw: Cigarette Enforcement

Please carefully read these scenarios and follow them. If there are any questions please contact your Chief Investigator.

Peter Persampieri
Director of Investigations
Criminal Investigation Division
NYS Department of Taxation and Finance
1740 Broadway (17th Floor)
New York, NY 10019

Office (212)459-7826 Blackberry (917) 932-4230
----- Forwarded by Peter Persampieri/ENFORCEMENT/NYSTAX on 07/06/2011 09:39 AM -----

From: Richard Ernst/EXEC/NYSTAX
To: Patrick Siriet/ENFORCEMENT/NYSTAX@NYSTAX, John Connolly/ENFORCEMENT/NYSTAX@NYSTAX, Scott Amaral/ENFORCEMENT/NYSTAX@NYSTAX, Christopher Lannon/ENFORCEMENT/NYSTAX@NYSTAX, Peter Persampieri/ENFORCEMENT/NYSTAX, Carl Cheek/ENFORCEMENT/NYSTAX
Cc: Jamie Woodward/EXEC/NYSTAX
Date: 07/06/2011 09:17 AM
Subject: Cigarette Enforcement

**Possible scenario's involving the movement of untaxed cigarettes in NYS (either premium alone, premium and native American or just native American) and when we could seize and/or charge.**

Native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS. - **Don't seize**

Native Americans transporting untaxed native American cigarettes from a reservation outside of NYS to a reservation inside NYS. **Don't Seize at this time. This may be the first type of Native American cigarettes that we seize.**

Native Americans transporting untaxed native American cigarettes from a reservation inside of NYS to a reservation outside of NYS.

**Don't Seize**

(Same three scenario's above but with premium brands or a split load of native brands and premium brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

Non native Americans transporting untaxed native American cigarettes from one reservation in NYS to another reservation in NYS. **Don't seize**

Non native Americans transporting untaxed native American cigarettes from a reservation outside of NYS to a reservation inside NYS.
**Don't seize at this time. This may be the first type of Native American cigarettes that we seize.**

---

Non native Americans transporting untaxed native American cigarettes from a reservation inside of NYS to a reservation outside of NYS.
**Don't seize.**

(Same three scenario's above but with premium brands or a split load of native brands and premium brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

---

Non native Americans transporting untaxed native American made cigarettes from one reservation in NYS to anywhere in NYS.
**Don't seize**

(Same scenario as above but with a split load of premium's and native brands)
**Seize the premium brands. If the majority of the truck is premium brands, for safety reasons seize the truck and release the Native American brand cigarettes.**

Non Native Americans, Middle Eastern and Foreign Nationals running a business in NYS and who are found selling untaxed native American made cigarettes at retail outlets such as bodegas etc.
**Seize the untaxed cigarettes whether they are premium or Native American brand .**

# Exhibit
# F

NEW YORK
STATE
SENATE
ALBANY, NEW YORK 12247

May 16, 2011

New York State Department of Taxation and Finance
Commissioner Thomas H. Maltox
Building 9, State Campus
Albany NY 12227

Dear Commissioner Maltox;

We write in today in reference to the regulations that have been issued for the collection of New York State Sales Tax on Native territories for sales of tobacco products made to individuals who are not Native Americans. In reading these regulations, it is clear that the issue of the sale of Native Brand cigarettes and tobacco products, which are produced on Native territories, are not addressed.

A call to your office yielded the response that this is a "gray area". We respectfully disagree. There is currently no process in place to stamp Native cigarettes in order to effectuate sales tax collection, as can and is done with so called premium brands. It is our view that Native Brand cigarettes, which are produced and sold on lands owned by Native Nations, constitutes commerce that is essentially Native to Native, and therefore cannot be regulated or taxed by the State of New York. This issue is completely separate and apart from the Departments and the Courts contention that sales tax can and should be collected for the sales of premium brands to non-Native individuals, even when such sales are made on Native territories.

It is our view that the State should not pursue an effort to collect taxes on Native Brands because such an effort would be contrary to the sovereign rights of the Native American Nations, and would be a severe blow to the Native retail economy.

PLEASE TURN TO NEXT PAGE

Since the regulations issued in the wake of the recent court ruling are silent on this issue, we request that you provide clarification to us as soon as possible and in writing. It is very important that all of the citizens of the State of New York and their elected representatives know what the intention of your Department is with regard to the collection of State taxes on Native Brand cigarettes and tobacco products.

We look forward to your timely reply and toward working with you to resolve this important issue.

Sincerely,

George D. Maziarz
Senator George Maziarz
Senate District 62

Timothy M. Kennedy
Senator Tim Kennedy,
Senator District 58

GDM:mn

# Exhibit G

Lipsitz Green Scime Cambria LLP

Attorneys at Law

42 Delaware Avenue, Suite 120, Buffalo, New York 14202-3924 P 716 849 1333 F 716 855 1580 (Not for Service) www.lglaw.com



February 22, 2013

Dennis C. Vacco, Esq.
Lippes Mathias Wexler Friedman LLP
665 Main Street, Suite 300
Buffalo, New York 14203

Dear Mr. Vacco,

I am writing this letter at the request of your office. Our office represents John Waterman and ERW (Iroquois) Wholesale, a company operating out of, and licensed as a cigarette wholesaler by, the Seneca Nation of Indians ("SNI") in Irving, New York. On August 10, 2012, the NYS Police in Saint Lawrence County seized some 84 cases of purportedly unstamped native-brand cigarettes owned by our client's company, while in route from the Saint Regis Mohawk Indian reservation in Akwesasne and Hogansburg, New York, to the SNI in Irving, New York.

Thereafter, as the Saint Lawrence County District Attorney's Office ("DA") did not prosecute, in early December of 2012, our firm filed an Article 78 Petition, seeking return of the cigarettes. The local ADA handling our client's matter early on was Jonathan Becker. The Attorney General's Office ("AG") handled the Article 78 action for the State. Like the DA's Office, the AG did not prosecute. The AG, in lieu of answering the Petition, informed us that our clients could pick up their cigarettes, which they did during the last week of December, 2012. Accordingly, a notice of discontinuance regarding the Article 78 matter was filed on January 11, 2013.

If there is anything else, please do not hesitate to contact the undersigned.

Very truly yours,

Timothy P. Murphy, Esq.

TPM/cmg

Writer's Extension: 323
Fax: 716-855-1580
E-Mail: tmurphy@lglaw.com

# Exhibit H

NEW YORK STATE SUPREME COURT
COUNTY OF ST. LAWRENCE

---

**The Matter of JOHN WATERMAN and IROQUOIS WHOLESALE,**

**Petitioners,**

**against**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHON BECKER; NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

**Respondents.**

**NOTICE OF DISCONTINUANCE**
C.P.L.R. Rule 3217

Index No. 140228
Case No. 44-1-2012-0856

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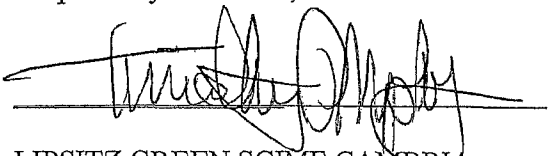
PLEASE TAKE NOTICE that Petitioners hereby voluntarily discontinue this proceeding with prejudice pursuant to C.P.L.R. Rule 3217(a)(1).

Respectfully submitted,



LIPSITZ GREEN SCIME CAMBRIA LLP
**TIMOTHY P. MURPHY ESQ.**
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STATE OF NEW YORK : SUPREME COURT
ST. LAWRENCE COUNTY

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**The Matter of JOHN WATERMAN and IROQUOIS WHOLESALE,**

Petitioners

**vs.**

**NEW YORK STATE POLICE, TROOP B COMMANDER, RAY BROOK, NY; NEW YORK STATE POLICE, EVIDENCE CUSTODIAN, RAY BROOK, NY; ST. LAWRENCE COUNTY DISTRICT ATTORNEY NICOLE M. DUVE'; ST. LAWRENCE COUNTY ASSISTANT DISTRICT ATTORNEY JONATHAN BECKER; NEW YORK STATE ATTORNEYGENERAL ERIC T. SCHNEIDERMAN; and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE COMMISSIONER THOMAS H. MATTOX, each in his or her official capacity,**

Respondents.

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## AFFIRMATION OF SERVICE

Index No. 140228

I, **TIMOTHY P. MURPHY, ESQ.**, being subject to the penalties for perjury, and pursuant to CPLR Rule 2106, duly affirm the following to be true and accurate to the best of my knowledge:

1. I am an attorney at law, duly licensed to practice my profession in this state; I am employed by the law firm of Lipsitz Green Scime Cambria, LLP, and am over eighteen years of age.

2. On January 11, 2013, I served a true copy of a Notice of Discontinuance regarding the above captioned proceeding by U.S. Mail, upon the following parties:

HON. NICOLE M. DUVE'
St. Lawrence County District Attorney
48 Court Street
Canton, New York 13617

AARON M. BALDWIN, ESQ.
Assistant NYS Attorney General
Litigation Bureau
The Capitol
Albany, New York 12224-0341

HON. ERIC T. SCHNEIDERMAN
NYS Attorney General
Regional Office
207 Genesee Street, Room 508
Utica, New York 13501

HON. THOMAS H. MATTOX
NYS Department of Taxation and Finance
W.A. Harriman Campus
Building 5, Room 500
Albany, New York 12227

HON. JOSEPH A. D'AMICO
New York State Police Superintendent
1220 Washington Avenue
Building 22
Albany, New York 12226-2252

Dated: Buffalo, New York
January 11, 2013

Respectfully submitted,

**TIMOTHY P. MURPHY, ESQ.**

# Exhibit I

STRAIGHT BILL OF LADING – SHORT FORM A-83876, 3013, 3014 T-3841, L3841, 3843 1-1

# STRAIGHT BILL OF LADING – SHORT FORM

NOTICE: Shippers of hazardous materials must enter 24-hour emergency response telephone number under "Emergency Response Phone Number."

Original—Not Negotiable

Date 3/2/2012 Bill of Lading No. 160

Shipper No.

Carrier No.

S.H.T.P.W.
(Name of Carrier)

| | |
|---|---|
| TO: Consignee S.H.T.P.W. | FROM: Shipper Speedway Cigarettes |
| Street 880 Bloomingdale Rd | Street 908 State Route 37 |
| Destination Batavia Zip Code 14013 | Origin Hogansburg Zip Code 13655 |
| Route: Vehicle No. 110604 SCAC | Emergency Response Phone Number |

| No. Shipping Units | HM | Kind of Packaging, Description of Articles, Special Marks and Exceptions. Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. See Section 2(e) of National Motor Freight Classification, Item 360. | Weight (Subject to Correction)* | Rate or Class | CHARGES |
|---|---|---|---|---|---|
| | | 92 Cases of Native made cigarettes | | | |

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading state whether weight is "carrier's or shipper's weight".

REMIT C.O.D. TO: ADDRESS

C.O.D. Amt. $

C.O.D. FEE: PREPAID ☐ COLLECT ☐ $

TOTAL CHARGES: $

Note–Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

$ _____ per _____

Subject to Section 7 of the conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other charges.

_____
(Signature of Consignor)

FREIGHT CHARGES
Check Appropriate Box

☐ Freight prepaid

☐ Collect

RECEIVED, subject to the classifications and lawfully filed tariffs in effect on the date of the issue of this Bill of Lading, the property described above in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated above which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment or (2) in the applicable motor carrier classification or tariff, if this is a motor carrier shipment. Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Mark with "RQ" if appropriate to designate Hazardous Materials as defined in the U.S. Department of Transportation Regulations governing the transportation of hazardous materials. The use of this column is an optional method for identifying hazardous materials on Bills of Lading per 172.201(a)(1) (ii) of Title 49 Code of Federal Regulations. Also when shipping hazardous materials, the shipper's certification statement prescribed in section 172.204(a) of the Federal Regulations, as indicated on the Bill of Lading does apply, unless a specific exception from the requirement is provided in the Regulation for a particular material.

The format and content of hazardous item list is the responsibility of individual company interpretation of requirements as described in 49 Code of Federal Regulations 172, Subpart C Shipping Papers. Such description consists of the following per Sections 172.201 (Hazardous Material Table) and Sections 172.202 and 172.203. Proper shipping name, hazardous class, UN identification number, packing group, and subsidiary class(es).

Note: Liability limitation for loss or damage in this shipment may be applicable. See 49 United States Code, Section 14706(c)(1)(A) and (B).

SHIPPER [signature] PER 3/2/12

CARRIER [signature] PER 3-2-12

This is to certify that the above named materials are properly classified, packaged, marked, and labeled, and are in proper condition for transportation according to the applicable regulations of the U.S. Department of Transportation.

Carrier acknowledges receipt of packages and any required placards. Carrier certifies emergency response information was made available and/or carrier has the U.S. Department of Transportation emergency response guidebook or equivalent documentation in the vehicle. Property described above is received in good order, except as noted.